Ai GROUP SUBMISSION

Department of Home Affairs
Australian Government

Exposure Draft of the Migration Amendment (Protecting Migrant Workers) Bill 2021

16 August 2021

Executive Summary

Ai Group welcomes the opportunity to provide a submission in response to the Australian Government's Exposure Draft of the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**the Bill**).

Ai Group does not support employers who fail to comply with workplace and migration laws. These laws are important in providing an appropriate safety net of protection for migrant workers, particularly those who are vulnerable in the community.

We acknowledge the Bill's broad purpose to strengthen migration laws to reduce opportunity for unscrupulous exploitation of migrant workers. To this end it is important the Bill appropriately targets exploitation of migrant workers rather than unintentional non-compliance with relevant laws.

The Bill relies on the Migration Act's current definition of *non-citizen* in the framing of new offences and civil remedy provisions. This definition obviously includes a far broader class of worker beyond the workers focused on in the Migrant Workers Taskforce Report where it was stated:

> "Our attention has mainly been on the employment experience of temporary migrants who have work rights under international student and working holiday maker (backpacker) visas since in large part these appeared to be the areas where problem was greatest." (p.5, Chair's Overview, 2019)

Given the Bill's reliance on the expansive definition of *non-citizen* and its inclusion of many high-income professionals with related professional qualifications, it is important that offences and penalties are not solely framed based on presumptions of vulnerability about non-citizens.

Ai Group has identified a number of problems with the proposed Bill that are detailed in the submission below.

In summary these problems include:

- The new offence at section 245AAB relating to using migration rules, appears to capture employers who may insist on particular work arrangements to satisfy migration rules. We do not think this is appropriate or what was intended in this provision.

- Ensuring that the Prohibited Employer provisions are appropriately targeted at specified *Fair Work Act 2009 (Cth)* (**FW Act**) contraventions relating only to non-citizens and not employees generally in which non-citizens may be included.

- Ensuring that the Prohibited Employer provisions are not based on contravention orders that may be the subject of appeal.

- Ensuring that the Prohibited Employer provisions do not prohibit employers from engaging non-citizen contractors employed by other businesses.

These provisions should be amended as we have outlined.

Ai Group welcomes the use of the Compliance Notices and Enforceable Undertakings as effective measures of intervention and enforcement that may obviate the need for prosecution. Similar tools of enforcement are contained in the FW Act and we consider it important that these measures be available to the relevant regulator to achieve compliance.

The Bill's new offences

The Bill introduces two new offences at section 245AA and 245AAB relating to a person coercing a non-citizen to breach work-related visa conditions and coercing a non-citizen by using migration laws.

These proposed offences attract maximum penalties of 2 years imprisonment and/or 360 penalty units. The offences may also be prosecuted as civil remedy contraventions attracting a maximum penalty of 240 penalty units. We note that similar existing offences in the *Migration Act 1958* (Cth) (**the Act**) contain equivalent terms of imprisonment and similar fault elements.

Ai Group has identified an issue with the second proposed offence at section 245AAB relating to a person coercing a non-citizen by using migration laws. While we understand the intent behind this proposed offence to ensure migration laws are not misused in cases of exploitation, we are concerned that the offence as drafted could capture employers insisting on lawful working arrangements.

For example, an employer who refuses to adjust a work arrangement to enable an employee to work hours in excess of relevant visa conditions, could be found to have committed an offence where the employer's refusal is based on ensuring work-related visa requirements are complied with.

The drafting of the offence at section 245AAB lacks the necessary qualification regarding the compliance of the work arrangement with a work-related visa requirement. We note that the Exposure Draft Context Paper refers to this offence arising in circumstances where the employee is unable to satisfy work-related visa requirements. As currently drafted the offence appears to be based on the application of coercion (or undue pressure and undue influence) rather than a non-compliant outcome. The drafting of this offence should be re-worded to capture the intent in the Content Paper.

Prohibited Employers

The Bill introduces new powers for the Minister to prohibit certain employers from employing additional non-citizens.

Specifically, sections 245AYC and 245AYD enable the Minister to declare certain employers prohibited from employing additional non-citizens, either as employees or as persons entering a contract for service (such as independent contractors). The prohibition is for a specified period

determined by the relevant declaration. The names of prohibited employers may also be published with such exposure designed as a further deterrent. An employer will have 28 days in which to show cause why the declaration should not be issued by the Minister and a decision to issue a declaration may be appealed to the Administrative Appeals Tribunal on the grounds of merits review.

Employers who may be declared prohibited employers by a declaration from the Minister include where an employer:

- is an approved work sponsor subject to a ban by the Minister; or
- is convicted of a work-related offence or subject to a civil penalty order in relation to a work-related contravention; or
- is subject to an order for a contravention of certain civil remedy provisions under the FW Act *and* the contravention is in relation to a non-citizen.

Section 254AYD(4)(d), in referencing contraventions of the FW Act described above, should be amended.

Firstly, the FW Act itself does not distinguish contraventions of civil remedy provisions between non-citizens and citizens. It is conceivable that employers who are subject to an order for contravention may be subject to an order that relates overwhelmingly to employees who are citizens and only one who is a non-citizen. This is made possible by section 557 of the FW Act which permits two or more contraventions to be taken as one contravention if the contraventions are committed by the same person and the contraventions arose out of a course of conduct by the employer.

It would be inappropriate for employers to be faced with additional sanctions of prohibition for one class of employee affected by the same contravention applying to others. We note too that the targeted focus of these contraventions was squarely at temporary migrant workers as identified by the Migrant Worker Taskforce Report at Recommendation 20 and not at workers generally.

Secondly, an employer subject to an order for contravention may be considering its right to appeal the relevant decision. This includes cases of public interest where the decision giving rise to the contravention raises issues of public importance for other employers and employees. It would be inappropriate for employers to be faced with a prohibition declaration when the decision giving rise to a contravention may contain grounds to appeal.

We also consider it inappropriate for Ministerial discretion to be exercised through the issue of declarations when decisions giving rise to contravention orders may be subject to an appeal.

Ai Group recommends that the following amendments be made to section 254AYD(4)(d):

> d) both:
>
> > (i) the person is the subject of an order made under the Fair Work Act 2009 for contravention of a civil remedy provision (within the meaning of that Act) covered by subsection of this section *and where the person has had the opportunity to exercise any appeal rights and the appeal or appeals have been determined*; and
> >
> > (ii) the contravention is *only* in relation to an employee who is a non-citizen.

A similar amendment is also required in section 254AYA (2)(d) – Overview.

The Bill's prohibited employer provisions at section 254AYB adopt an expansive definition of ***employs*** to include the engagement of a person under a contract for service (other than for domestic purposes). Businesses frequently engage an array of contractors (e.g. for repair and maintenance work, management consultancies, marketing projects and IT) in a wide range of circumstances that are likely to be unrelated to the contravention giving rise to the prohibition.

While we presume that the expanded prohibition to include independent contractors is to limit the opportunity for avoiding the effect of the prohibition, (e.g. for roles that may be more suited to employment) our concern is that employers are placed in the position of having to determine whether each business contractor engaged with are in fact non-citizens or supplying non-citizen workers, to comply with declaration.

The definition also potentially covers employers who may inadvertently engage non-citizens where those non-citizens are employed by somebody else, (such as a labour hire arrangement or other contracting entity), and whether that is included as a 'contract for services.' This outcome in our view exceeds what was contemplated by the relevant recommendation in the Migrant Workers Taskforce Report.

Ai Group recommends that the definition of ***employs*** be amended to say:

> **245AYB Meaning of employs**
>
> For the purposes of this Subdivision, a person employs a non-citizen if, and only if:
>
> > (a) the person employs the non-citizen under a contract of service; or
> >
> > (b) the person engages the non-citizen, other than in a domestic context *or where the non-citizen is employed by another person*, under a contract for services.

New provisions reinforcing the requirement to use VEVO

Ai Group notes that these provisions are aimed at ensuring that VEVO is the computer system utilized to identify whether a person can lawfully work. Ai Group considers it important that the Bill's provisions enable a level of flexibility in respect of who may undertake these VEVO checks.

Aligning and increasing penalties

Ai Group notes the Bill's increase in civil pecuniary penalties. To this end civil prosecution with higher penalties may be more appropriate for remedial outcomes than punitive criminal proceedings involving imprisonment.

Compliance Notices and Enforceable Undertakings

Ai Group welcomes the Bill's provisions relating to compliance notices and enforceable undertakings as enforcement tools aimed at achieving remedial compliance without punitive litigation.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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