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Dear Migrant Worker Compliance Section,

Re: Submission to the Migration Amendment (Protecting Migrant Workers) Bill, Exposure Draft, 2021

Thank you for the opportunity to present feedback on the draft bill: *Migration Amendment (Protecting Migrant Workers)* 2021. I am pleased to see the Government's work to implement these sections of the *Migrant Worker Taskforce Report* (henceforth 'MWT') and its careful consideration of the issues raised in the Report. I contain my feedback to the relevant sections of the proposed legislation, rather than extending it to potential changes to visa policy that were not considered comprehensively within the final report of the MWT in any case. These comments are based on my own views as a migration researcher and do not represent those of the University of Sydney.[1]

Existing policy parameters to protect migrant workers
The Context Paper identifies the *Migration Act (1958)* (Cwth), (henceforth "*Migration Act*"), Subdivision C, Division 12, Part 2 as providing an existing framework to penalises employers who allow unlawful non-citizens to work.[2] Primarily, these provisions deal with illegal/undocumented migrants (defined as those without visas) and their employment. They do not deal with other migrants who may be hired in breach of their working conditions but who are lawfully in Australia. While illegal migrants comprise an important component of current migrants within Australia (estimates vary between 50,000 and 100,000 people[3]), clearly the bulk of vulnerable migrants are visaed and

[1] Despite this, thanks to Professor Joellen Riley Munton (UTS), Tim Payne, Esty Marcu, Olivia Perks and Denise Wee (Usyd) for expert legal and policy insights on this submission.
[2] Section 14 of the *Migration Act* defines an "Unlawful non-citizens" as "(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen. And (2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen."
[3] Compare: Howells, S. (2011). Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007. Canberra, Commonwealth of Australia, para 41; Howe, J., et al. (2019). Towards a durable future: Tackling labour challenges in the Australian horticulture industry Sydney, University of Sydney, p.36 relying upon Department of Home Affairs data presented in Senate estimates from 2017

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therefore, there is a strong policy need to also address this latter population. The Context Paper also identifies the *Employer Sponsor Framework*, although also notes several limitations with its operation (see page 8 of the Context Paper).

Employer blacklisting

The Bill extends the penalties on employers who hire illegal migrants to those who either persuade or coerce visaed migrants to work in breach of their visa conditions and then threaten to take steps that could result in their visas being cancelled, or who withhold evidence that could further immigration advantages for existing visaed migrants. It also adds new penalties for such offences. These provisions are important for migrants on temporary visas, whom my research shows are most at risk of exploitation by employers than those on permanent visas. Forthcoming research in my four-country comparison *Patterns of Exploitation: Migrant Worker Rights in Advanced Democracies* (Oxford University Press, 2022), demonstrates that even once controlling for the greater population size of temporary migrants. This is particularly true of migrants on temporary work visas. The degree of employer control over migrants' ongoing visa status would appear to explain these trends. Therefore, any regulatory attempts to decouple work rights and ongoing visa rights – as these reforms partially represent – is to be commended.

Coercion of non-citizens to breach a work-related condition

The proposed legislation creates a civil penalty of 240 penalty units for an employer who uses undue influence or pressure on a non-citizen to breach work-related visa conditions. One example provided is requiring an international student to work longer hours than permitted under their visas (until COVID-19, 40 hours a fortnight, this has now been extended to allow international students to earn more while there is limited alternate income support available to them). This new condition in the draft legislation is welcomed as it is well documented both by the Taskforce, but also the media and case law, that such arrangements are common in the employment of international students. However, the central issue here will be proof. Often employers can conceal this information from detection through the use of dissolvable messages such as on Instagram or Snapchat, or instances where only the first name of the employer is provided and therefore effectively untraceable. The Bill partially addresses this by placing the evidential burden on the employer for criminal penalties of up to two years imprisonment. It is possible that the initial bearing of the evidentiary burden by the defendant was sought to mirror the approach adopted for general protection matters within the *Fair Work Act* (2009), although here it is being applied to criminal offences. However, it should be noted that a men rea element continues to constitute a component of this offence and therefore arguably, once the employer has mounted a successful counterargument for the alleged behaviour, it will be difficult for a plaintiff to prove otherwise, especially in a criminal setting with criminal standards of proof.

Coercion of non-citizens by using migration rules

The proposed legislation creates a civil penalty of 240 penalty units for an employer who uses undue influence or pressure on a non-citizen to accept or agree to work, which if they were to avoid acceptance, would have an adverse impact upon the non-citizen's future immigration prospects. This section is clearly targeted to visas such as the Working Holiday Maker Subclass 417 Visa and its 88-day rule that requires "sign-off" for work in regional Australia in order to see an extension to the visa for a second year. This change is welcome, particularly given the high rates of complaints in the horticulture area when compared with the low number of cases brought against employment law breaches in this area. For instance, a survey by the National Union of Workers (albeit not a representative sample and therefore potentially unreliable) of horticulture and agricultural workers

found that 67% reported underpayment, but according to my analysis of litigated cases, a very small number sought to enforce their rights through litigation.[4] Further, the recent case of horse breeder Gregory Richard Douglas demonstrates the risks of sexual violence towards female migrant workers in some workplaces in these sectors, given their geographical isolation and lack of ability to access support services.[5]

Again, the issue here would appear to be principally an evidentiary one – how it will be possible to demonstrate that short-term temporary migrants have been denied a positive entitlement, such as the "sign-off" for work experience days, due to their opposition to inappropriate workplace arrangements or behaviour by the employer. In the Douglas case, the applicants' position was bolstered by the fact that there were numerous women who had experienced the same conditions of sexual harassment and assault, thereby rendering their arguments more convincing, however, this might not be uniformly the case. This condition could be difficult to prove. Clearly in very serious cases like the Douglas matter, other criminal law protections can also be relied upon. Further, it is unclear from the facts of that case whether the migrant workers in question had access to discretionary extensions of their visas or not (a matter outside this exposure bill for as noted, potential reforms to visa conditions are not considered here).

Enforcement

This discussion goes to the key concern with the proposed legislation's new offences, which is the availableenforcement mechanisms. At present in Australia, enforcement, while strong in comparative perspective when the litigation profile of the Fair Work Ombudsman is considered, is not funded as greatly as it could be, especially in the immigration area.[6] An FOI of Department of Home Affairs investigations undertaken under the existing *Migration* Act, Subdivision C compliance provisions demonstrates that in the financial years 2019-2020 and 2020-2021, only one employer in each year received a referral (section 245AE offence) or a prohibition (section 245AS offence).[7] When we compare this with the estimated illegal population of between 50,000 to 100,000 migrants, this level of enforcement is clearly vastly inadequate. The FOI request also demonstrates that neither of these cases proceeded to court action.

It is through this lens of low levels of present enforcement against employer compliance breaches that the proposed short-term blacklisting of employers who commit

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[4] National Union of Workers (2019) *Farm Workers Speak Out*, NUW Survey Report c.f. Boucher, Anna *Patterns of Exploitation: Migrant Worker Rights in Advanced Democracies*, New York, Oxford University Press, forthcoming, drawing upon a Database of 1000 cases litigated by migrant workers demonstrates that over the period 1996-2016, only 256 workers within this sector ISCO code sought to enforce their rights via litigation in Australia. See in particular Chapter 4. In contrast, over this time, the stock of WHM visa-holders has varied between 115,444 and 211,011. The number of litigated cases represents a very small percentage of this overall population.

[5] Costin, Luke, 2021, "Jail for sex abuse of isolated backpackers," available at https://www.perthnow.com.au/news/crime/jail-for-sex-abuse-of-isolated-backpackers-c-3656402, August 11, 2021.

[6] Chapter 8 of my forthcoming book finds that Australia has quite high rates of enforcement via court action when compared with Ontario, British Columbia, Alberta, England and the State of California however as a percentage of the population, our overall investment in enforcement per worker is low; only British Columbia has a lower percentage of workplace inspectors per million workers: see Boucher forthcoming, above. Therefore, when evaluating governmetn enforcement it is necessary to consider various metrics for comparison.

[7] Thanks to Jackson Taylor, Partner at Hammond Taylor for providing me with this FOI request data, dated Freedom of Information Request FA 21/07/00914

infringements must be viewed. I have several potential concerns with the way in which this listing has been formulated:

- The regulations for prescription of an employer as in breach of these new provisions is to be determined by the Minister rather than through primary legislation.
- There will be exceptions in the regulations.
- The employer is only prohibited for a set period of time, even if the offence is egregious. Employers may view this as the cost of doing business.
- There is no indication of how funding for enforcement will be increased to support the implementation of these new offences.
- It is unclear whether non-citizen workers employed by a reported employer will enjoy any visa protections during this reporting period. In other countries, such as the United Kingdom, protections from deportation for migrant workers who commit an immigration offence exist under the *Modern Slavery* Act (2015), s45, where their employers is also the subject of modern slavery offences. Such protections could be considered here for the broader remit of workplace offences identified in this bill (and likely to be identified in subsequent *Fair Work* Act reforms, as otherwise there is the potential that is migrant workers who are penalised via deportation for the non-compliance of their employers. Providing such protections would also increase the likelihood that migrant workers will cooperate with enforcement bodies in action against their employers. This recommendation is notwithstanding the two protection visa for victims of human trafficking that are at present supported through the Australian Human Trafficking Visa Framework.[8] However, the numbers accessing these visas are small and clearly do not represent the full scope of those potentially experiencing exploitation.
- While there is an assurance protocol between DHA and the FWO that purports to protect migrant workers who make a complaint about workplace conditions from subsequent visa cancellation, concerns have been raised about the breadth of its application (including to those in breach of visa conditions related to working rights) and also how this assurance would actually operate in the event of a visa cancellation.[9] As such, there is a need for further strengthening of these provisions, along with enforcement to ensure that migrant workers come forward to make complaints about the offences outlined in the proposed legislation.

Areas of the MWT not covered in this draft bill

Finally, it should be pointed out that some dimensions of the MWT recommendations that are appropriately within the remit of this draft exposure bill, do not appear to have been considered here. These are the following:

> Recommendation 7: It is recommended that the Government give the courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers [there is limited

[8] Temporary Bridging F visa (BVF) and Permanent Referred Stay visa (RSV))

[9] Berg, L. and B. Farbenblum (2018). "Remedies for Migrant Worker Exploitation in Australia? Lessons from the 7-Eleven Wage Repayment Program." Melbourne Law Review **41**(3): 1035-1084, discussion at pp1082-3.

information about how the courts will be given these powers, that appear instead to be at ministerial discretion but reviewable];

Recommendation 21: It is recommended that the Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints [Footnote 1 of the Context Paper to the Bill notes that this issue is being dealt with elsewhere]

It is hoped that these recommendations 7 and 21 are considered in subsequent legislative reforms and that the other recommendations in the MWT report are addressed through reforms to the *Fair Work Act* (2009) (Cwth) and other appropriate federal and state legislation.

I am happy to answer any questions about this brief submission.

Yours sincerely,

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