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13 August 2021

Department of Home Affairs
By electronic transmission5

To the Department of Home Affairs

Submission on Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021
I write on behalf of Hammond Taylor, a specialist Australian immigration law firm in relation to the Department of Home Affairs' consultation process for the Exposure Draft of the *Migration Amendment (Protecting Migrant Workers) Bill 2021*.

About Hammond Taylor
Hammond Taylor is a globally recognised full-service Australian immigration law firm specialising in visa services and global mobility. We help people and organisations navigate the immigration journey by providing the visa knowledge and personalised solutions to achieve their goals.

Hammond Taylor specialise in visa services for organisations, strategic advice, training, advocacy and compliance. Our commercial expertise is focused on global mobility and corporate immigration for Healthcare, IT, Engineering, Start-up and Defence sectors, including market entry and set-up.

About Jackson Taylor
Jackson is a Partner at specialist immigration law firm, Hammond Taylor, and co-founder of Complize, an online RegTech software platform which assists organisations manage immigration compliance.

Jackson has worked in immigration since 2008 and focuses primarily on employer sponsored immigration including compliance, training, and advocacy. Jackson was recognised as one of the Best Immigration Lawyers in Australia for 2022 and is a member of the LIV Migration Law Committee and Technology and Innovation Section.

He presents regularly on Australian immigration law and policy, has lectured on immigration law at the Australian Catholic University, and is frequently cited in the media on immigration matters.

Should you require further information, please feel free to contact me on 0449 997 362 or email at j.taylor@hammondtyalor.com.au.

Yours faithfully,

Jackson Taylor

Partner

Australian Legal Practitioner

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Summary

We support the government's efforts to eliminate exploitation of temporary visa holders through improved regulation of the sector. In particular, the Government's in-principle acceptance of the Migrant Workers' Taskforce Report issued 2019 is welcomed in light of the Taskforce's comprehensive review of the necessary reforms to reduce exploitation and abuse.

It is widely recognised that temporary visa holders experience higher levels of exploitation than other sectors of the population. This can be attributed to multiple factors, not least their temporary status in Australia and the way in which their visa conditions impose restrictions on their workplace engagement.

Identifying these factors and setting appropriate legislative and regulatory frameworks that redress the power imbalance between temporary visa holders and potentially exploitative employers is essential to reducing, and ultimately eliminating, exploitation.

Government actions over the last decade, which include introducing a wider range of offences to prevent exploitation, implementation of the VEVO system to verify work rights, and the current Government's greater funding of the Fair Work Ombudsman, and refinements to the *Fair Work Act 2009* (the '*FWA*') have all contributed to improvements in the sector. But recent data demonstrates that high levels of exploitation continue throughout different sectors of the economy.[1]

The present Bill is well founded in its efforts to improve the existing scheme by harmonising the penalty regime and introducing new offences targeted at current weaknesses in the system. In particular, the use of coercion by exploitative parties and the 'gap' relating to non-sponsored temporary visa holders such as Sc 500 Student and Sc 417 Working Holiday visa holders.

However, undercutting these positive efforts is limited enforcement activity in the sector. A recent Freedom of Information request from the Department (FA 21/07/00914) shows that in the past 2 years only three matters have been pursued by authorities against employers under the existing penalty provisions related to workplace offences under ss 245AR, 245AS, 245AD, 245AE, 245AEA and 245AEB. Of these, two actions were terminated, and one infringement notice was issued. This low level of activity is despite widespread evidence and reporting of wrongdoing in the system by academics and media. Greater investment in enforcement activity by the regulator is necessary to deter would be wrong doers and ensure that exploitative employers are penalised and prevented from further abuse.

This submission seeks to provide input on the proposed legislative settings, including concerns about the proposed legislation and potential areas for improvement. The submission concludes that while the proposed reforms are largely well-formulated and targeted, efforts to reduce exploitation are undermined by the lack of enforcement activity.

[1] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (10 November 2017).

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Recommendations

Part 1 – New employer sanctions

Recommendations:

- Support the creation of new offences 245AAA and 245AAB and inclusion of conduct which has not yet resulted in breach as well as conduct which has led to breach.
- Ensure visa holders who breach their visa conditions as a result of coercion will be protected by law from adverse enforcement action as a result of the conduct prohibited by ss 245AAA and 245AAB.
- Align definitions with those applied by common law in Fair Work jurisdiction.

Part 2 – Prohibition on certain employers employing additional non-citizens

Recommendations:

Section 245AYB

- Revise the meaning of 'employs' at s245AYB to capture labour hire and 3rd party contracting arrangements.
- Ensure that s245AYB captures organisations operating as a corporate group and the use of associated entities.

Section 245AYD

- Alter operation of s245AYD(1) to render an employer who has breached sub-section (4) be declared a prohibited employer unless the Minister exercises discretion on the basis of factors set out at s-s (2)
- Retain requirement under 245AYF(5) for written notice and consideration of reasons in the interests of Natural Justice.
- Consider how timeframes at the AAT may affect employers and whether such matters will require a 'fast track' hearing mechanism.

Part 3 – Use of computer system to verify immigration status

Recommendations:

- Support the creation of a positive obligation to verify the visa status of non-citizens and non-permanent resident visa holders, in the interests of reinforcing the employers existing obligation to understand the visa status and work rights of prospective employees.
- Implement an education campaign through the Fair Work Commission and other government authorities to re-enforce awareness among Australian employers about the legal obligation to verify the visa status of employees.

Part 4 – Aligning and increasing penalties for work-related breaches

Recommendations:

- Support the alignment of penalties for all work-related breaches
- Strongly recommend that government increase resource available to conduct systematic investigation and enforcement activity to send a message to exploitative employers

Part 5, 6 & 7 – Enforceable undertakings & Compliance notices for work-related breaches and other amendments

Recommendations:

- Support the creation of additional powers to ensure that employer comply with penalties and orders under the *Act.*
- Support the use of the model powers in the *Regulatory Powers (Standard Provisions) Act* 2014.

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Part 1 – New employer sanctions

The Exposure Bill proposes to create two new offences:

- 245AAA Coercing etc. a non-citizen to breach work-related conditions; and
- 245AAB Coercing etc. a non-citizen by using migration rules.

The introduction of the proposed offences is supported in light of the potential for these provisions to reduce conduct which seeks to leverage the power imbalance between employer and temporary visa holder employee.

We consider it appropriate that the penalties set out in 245AAA and 245AAB incorporate conduct which will lead to potential prohibited conduct (ie, coercion has not yet resulted in breach) and coercion which has resulted in breach.

The Department should consider what regulatory machinery is necessary to ensure that any temporary visa holder who has breached their visa conditions under duress should be protected from detrimental enforcement action arising from the breach. Given the fact that the risk is a primary element of the power imbalance used by unscrupulous employers to manipulate or coerce visa holders, addressing this issue will be critical to the utility of the proposed offence. If visa holders remain fearful of alerting the Department or ABF of this conduct then the ability to use the offence to prosecute risks being greatly reduced.

We recommend that the definition of 'coerce', 'exert undue influence', and 'undue pressure' be aligned, in so far as possible, with the common law definition utilised in assessment of Fair Work matters.[2]

Part 2 – Prohibition on certain employers employing additional non-citizens

We support the prohibition on employers who have been found to have breached workplace laws from employing additional temporary visa holders for a period of time. We consider that the current absence of such prohibitions is a 'gap' in the existing legal framework and one that demonstrates how easily exploitative employers can continue to operate despite past sanctions. We consider the proposed 12 month period to be a suitable period of time.

We consider that the proposed framing of sections 245AYB and 245AYC may not use broad enough language to prohibit bad faith employers from using more 'creative' employment arrangements such as 3rd party contractors or associated entities. As such, we would encourage the Department to consider revising the language to ensure

[2] Fair Work Commission, *General Protections benchbook*, https://www.fwc.gov.au/general-protections-benchbook/workplace-rights-protections/coercion, accessed 14 August 2021.

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that the prohibition prevents the prohibited employer from engaging temporary visa holders through sub-contracting arrangements or use of associated business entities. Consideration should also be given to how individual directors may be prevented from engaging in such conduct if they seek to establish new business entities which are not subject to the employer prohibition.

Section 245AYD should be re-structured by amending sub-section (1) to automatically lead to employers who have been found to breach of the kind set out in sub-section (4) to be declared a prohibited employer, unless the Minister exercises discretion on the basis of a decision under subsection (2).

We consider that the significance of an organisation having already been found to have breached workplace or immigration laws in regard to a temporary visa under s-s (4) is sufficiently serious that the presumption the party should become a prohibited employer is justified in this context. An existing penalty of the type set out in (4) demonstrates a lack of compliance with the necessary protections extended to temporary visa holders.

In the interests of natural justice, we agree that employers should be informed in writing prior to the prohibition taking effect (per s-s (5) & (6)) and provided the opportunity to make written submissions to the Department regarding the nature of the offences.

We note the provision allowing the employer to appeal any decision to the Administrative Appeals Tribunal. Given current time frames within the AAT the ability for an employer to appeal would need to be fast tracked to provide any form of natural justice.

Part 3 – Use of computer system to verify immigration status

The proposed changes create a positive obligation on employers / persons referring non-citizens for work (proposed ss 245AEC & 245AED) to complete a VEVO check or obtain information through an arrangement with another person. Failure to do so would result in a penalty of up to 48 Commonwealth penalty units.

We consider that creating a positive obligation to verify visa status and work conditions is necessary considering these obligations have been in place in some form since 2007. Despite more than a decade passing since the introduction of these laws, it is our experience that many Australian employers still do not understand their obligations under immigration laws. We consider that verifying the visa status of potential employees is critical for organisations in light of the existing immigration obligations to only employ individuals with a valid visa and relevant work rights.

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Considering that employers have an existing legal obligation to only employ visa holders with relevant work rights, we consider that the creation of a positive obligation on employers to conduct a VEVO check or make related enquiries is one of few options available to re-enforce the existing obligation on employers.

Despite the significant number of temporary visa holders in the Australian labour market, we continue to encounter business owners who are unaware of the relationship between immigration and their workplace duties. We encourage the Department to consider how a positive obligation to conduct VEVO checks should be accompanied by an education campaign, targeted at ensuring employers are aware of their obligations.

Part 4 – Aligning and increasing penalties for work-related breaches

The proposed change to amend penalties to bring them into line with related 'Charging for a Migration Outcome' penalties under the *Migration Act* are supported.

Contrary to statements made in the accompanying Context Paper, we do not consider that baith faith employers are incorporating the costs of this conduct into their business model. Rather, we consider that the absence of enforcement means that exploitative employers are emboldened to abuse the law on the basis of a simple calculation of the low likelihood of any action being taken against them by authorities.

For this reason, it is critical that government fund appropriate enforcement activity and significantly expand the volume of investigation and enforcement activity.

Part 5, 6, & 7 – Enforceable undertakings & Compliance notices for work-related breaches and other amendments

We support the extension of powers for the purpose of enforceable undertakings using the *Regulatory Powers Act 2014*.

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Conclusion

We support the government's proposals to improve the regulatory framework to reduce exploitation and abuse of temporary visa holders. We consider it highly positive that the government recognises that bad faith employers may:

- use immigration laws, regulations, and visa conditions to coerce and potentially blackmail visa holders; and
- undermine the market by using labour at below legal costs, thus undercutting competitors in the industry.

The proposed amendments go some way to achieving the purpose of Recommendation 19 (legislation to prevent coercion) and 20 (mechanisms to prevent employers from employing non-sponsored temporary migrants) of the Migrant Workers' Taskforce.

We consider the prosed reforms are positive and could have meaningful impact:

- the new offences relating to coercion of temporary visa holders can provide additional protections to temporary visa holders and is to be welcomed
- the increase and alignment of penalties is a commonsense proposal which signals that all workplace offences are of the same level of seriousness
- The proposal to ban employers found responsible for a breach of immigration / workplace law from employing non sponsored temporary visa holders is potentially significant for a number of industries and can operate as a significant incentive for employers in these sectors to proactively address non-compliance.

This paper makes a number of recommendations above to potentially improve the Draft Bill and which identify 'gaps' in the proposed system. We consider that taken in conjunction with the input of others in the sector, there is the potential for the proposed Bill to meaningful and useful in reducing exploitation.

But we submit that reducing exploitation and abuse of temporary visa holders requires a drastic increase in investigation and enforcement. As noted above, a recent FOI document suggests low levels of activity in the past 24 months. The apparent level of investigation and enforcement activity is unlikely to discourage exploitative employers from engaging in abusive conduct, who see the risk of being identified as low and therefore continue their unlawful conduct.

With the newly proposed offences and powers the ABF will have the necessary means to take a much higher level of activity to address misconduct. In particular, by adopting the techniques of the Fair Work Ombudsman, and selecting high profile targeted litigation against employers has the potential to send a public signal that exploitative behaviours will not be tolerated.

While additional offences and increased penalties are important, investment and appetite from government for a major increase in enforcement action is required to achieve the public policy goals of reducing exploitation and abuse of temporary visa holders. Until this occurs, bad faith employers will continue to abuse temporary visa holders knowing the risk of being caught is very low.