16 August 2021

SUBMISSION TO THE DEPARTMENT OF HOME AFFAIRS ON THE MIGRATION AMENDMENT BILL 2021

1. Introduction

1.1. The Migrant Workers Centre (hereafter the MWC) welcomes the opportunity to provide this submission to the Department of Home Affairs (hereafter the DHA) regarding the proposed amendments to the *Migration Act 1958* (hereafter the Act).

1.2. The MWC is a non-profit organisation located in Carlton, Victoria, that helps migrant workers understand their workplace rights and get empowered to enforce them. Although the MWC advocates for all workers who were born overseas and work in Australia, regardless of their migration status, we hereby refer to only workers on temporary visas as 'migrant workers' for the purpose of this submission. We also recognise that there are over 1.7 million people surviving the pandemic on temporary visas in Australia today with neither access to social services nor proper protections of workplace rights.

1.3. Notably, labour exploitation is conditioned by various factors, and migrant workers' rights are not prescribed by the Act. We encourage the DHA to exercise its influence on the Government and help it fulfill its commitment made in March 2019 to implementing all the recommendations of the Report of the Migrant Workers' Taskforce.

1.4. What needs to precede the DHA's Migration Amendment Bill 2021 (hereafter the Bill) is the Government establishing "a whole of government mechanism" for the protection of migrant workers, following Taskforce Recommendation 1. As a priority, the DHA should follow up the effort by collaborating with the Fair Work Ombudsman on improving the Assurance Protocol as outlined in Taskforce Recommendation 21.

1.5. We recognise the Bill focuses on Taskforce Recommendations 19 and 20 and exclusively discusses penalising exploitative employers.

Taskforce 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.

Taskforce 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.

1.6. Owing to its limited scope, the Bill has inherent flaws that not only make it incapable of achieving its purpose of protecting migrant workers, but will create new barriers to the reporting of workplace exploitations.

1.7. In the remaining sections of the submission, we focus on Parts 1, 2, and 3 of the Exposure Draft of the Bill and recommend multiple revisions to the proposed amendments so that the Bill could improve measures to detect breaches of the Act, minimise the impact of the breaches on migrant workers, and practically contribute to protecting migrant workers from exploitation as it claims to.

1.8. Additionally, we urge the DHA to pay attention to the rest of the Taskforce Recommendations and encourage the Government to introduce essential measures for the protection of migration workers, namely, the Fair Entitlements Guarantee program for migrant workers in accordance with Taskforce Recommendation 13 and a national labour hire licensing scheme, as suggested in Taskforce Recommendation 14, through replication and scaling up of the best practice requirements of the Queensland and Victorian state schemes.

2. Summary of recommendations

Recommendation 1. The DHA should encourage the Government to immediately establish "a whole of government mechanism" that ensures the protection of migrant workers from exploitation.

Recommendation 2. The DHA should prioritise reviewing the Assurance Protocol with the Fair Work Ombudsman and strengthening safeguards for victims of migrant labour exploitation.

Recommendation 3. The DHA should add further amendments to Part 1 to give migrant workers whistle-blower protections. When an employer is subject to a civil penalty order or convicted of contraventions of the Act, whistle blowers who lose their job and consequently their employer-sponsored visa as well should be given 90 days in addition to the 60 days they currently have in which to find an alternate sponsoring employer. No whistle blower should be made subject to a visa eligibility criterion "Have complied with previous visa conditions" in their lifetime in Australia.

Recommendation 4. The DHA should revise the restrictive regulations of temporary visas that hinder holders of the visas from exercising their workplace rights. As a priority, people on student visas should not be subject to Conditions 8104 and 8105 that prohibit them from working more than 40 hours a fortnight. Extensions of Working Holiday and Work and Holiday visas should not be contingent on the satisfaction of any specified work requirements.

Recommendation 5. The DHA should create a new bridging visa with the right to work and help regularise the stay of migrant workers who are victims of workplace exploitation, harassment, or injury. When their cases are being heard by the Fair Work Commission or by court, when they are assisting the Fair Work Ombudsman with an ongoing investigation, or when they are receiving medical or psychological treatment, most migrant workers are forced to leave Australia in the middle of their lengthy processes. This bridging visa for the victims of industrial injustice should be regarded as a qualifying substantive visa when the victims apply for another visa afterwards.

Recommendation 6. The DHA should revise Part 2 and have the owners, shareholders, and members of a body corporate which has been declared to be a prohibited employer personally subject to the additional migrant worker exploitation prohibition.

Recommendation 7. The DHA should add further amendments to Part 2 to protect the additional employees from any adverse immigration outcomes as a result of their employer's contravention. For example, no future amendment to the Migration Regulations 1994 should be made to the effect of not allowing the additional employees to count the work they carried out for a prohibited employer toward meeting their visa conditions. As a principle, the DHA should not disadvantage the additional employees for the Department's own failure to detect the prohibited employer's contravention in advance.

Recommendation 8. The DHA should keep the Fair Work Ombudsman and trade unions updated of the list of prohibited employers and collaborate with them to regularly check on the prohibited employers and prevent them from developing a black market for migrant labour.

Recommendation 9. The DHA should delete the amendments in Part 3 in entirety from the Bill. In their replacement, the DHA is advised to introduce measures to proactively disseminate the message that the standards under the *Fair Work Act 2009* apply to every worker equally, both citizens and non-citizens, in line with Taskforce Recommendation 3. We suggest the DHA provide information about workplace rights in community languages each time a visa with right to work is issued. The Government should also facilitate follow-up education for migrant workers upon their arrival by funding trade unions and community legal centres to offer workplace rights workshops in community languages.

Recommendation 10. The DHA should pay attention to the rest of the Taskforce Recommendations and encourage the Government to introduce essential measures for the protection of migration workers, namely, the Fair Entitlements Guarantee program for migrant workers in accordance with Taskforce Recommendation 13 and a national labour hire licensing scheme, as suggested in Taskforce Recommendation 14, through replication and scaling up of the best practice requirements of the Queensland and Victorian state schemes.

3. Part 1—New employer sanctions

3.1. The MWC evaluates Part 1 of the Exposure Draft to be unlikely to contribute to protecting migrant workers from exploitation due to its exclusive attention to punishing employers who have breached the Act. Punitive sanctions do not automatically lead to deterrence of recommitment. Due to inevitable detection failures, not all exploitation is punished, and not all punishments guarantee deterrence of recommitment. **To effectively deter migrant worker exploitation, we need to introduce heavy sanctions against it, increase the likelihood of its detection, and most importantly, eliminate the factors making migrant workers vulnerable to exploitation.**

3.2. Part 1 introduces penalties for a person who "coerces, or exerts undue influence or undue pressure on, a non-citizen" to accept a work arrangement in breach of visa conditions (Subsection 245AAA) or in expectation or for fear of certain immigration outcomes (Subsection 245AAB). While we welcome the Bill's approach to hold employers responsible for contraventions of the Act regardless of their "knowledge or recklessness", we believe it will still not be effective.

3.3. Contraventions taking place around immigration issues at workplaces are hard to detect if migrant workers do not report or acknowledge them. **This Bill provides no incentive for migrant workers to collaborate with the DHA.** Understandably, reporting one's employer to the DHA or acknowledging their contraventions may have adverse effects on the migrant worker's visa status and potentially harm their settlement plan. Contraventions under Subsection 245AAA can be made against migrant workers with restrictive work rights—such as student visa holders and working holiday visa holders—whereas contraventions under Subsection 245AAB are more likely to affect those on employer sponsored visas and those in pursuit of one. Victims of the contraventions under Subsection 245AAA might fear or be subject to visa cancelation or removal from the country because they would have breached their visa conditions. On the other hand, victims of the contraventions under Subsection 245AAB might lose a pathway to permanent residency because they no longer have a sponsoring employer.

3.4. Suppose an employer coerced a migrant worker on a temporary visa to pay them in exchange for sponsorship for a Temporary Skill Shortage (subclass 482) visa. If the worker paid the employer and reported them to the DHA, the worker no longer meets the visa eligibility criteria that states one has "not contravened 'paying for visa sponsorship' legislative provisions". If the worker did not pay the employer and still reported them to the DHA despite having no evidence, the best-case scenario will leave the worker with no sponsoring employer for the next visa and no alternative but to leave Australia. Box 1 illustrates a true story example reported to the MWC.

3.5. We recommend **the DHA add further amendments to Part 1 to give migrant workers whistle-blower protections.** The Bill should state that when an employer is subject to a civil penalty order or convicted of contraventions of the Act, their employees on temporary visas get protection from any adverse immigration consequences such as visa cancelation due to sponsorship loss or charges against visa

condition breaches inadvertently made due to employer coercions. Whistle blowers who lose their job and consequently their employer-sponsored visa as well should be given 90 days in addition to the 60 days they currently have in which to find an alternate sponsoring employer. No whistle blower should be made subject to a visa eligibility criterion "Have complied with previous visa conditions" in their lifetime in Australia.

Box 1. Punished for following the rules

Peng (pseudonym) came to Australia in 2008 on a Work and Holiday (subclass 462) visa. She found a job at a remedial therapy service as an acupuncturist as she had studied alternative medicine. Her employer liked her skills and sponsored her for a Temporary Work (subclass 457) visa.

When her 457 visa was about to expire, Peng asked her employer for sponsorship for an Employer Nomination Scheme (subclass 186) visa. He demanded AUD 60,000 in return. Knowing it was unlawful to pay for visa sponsorship, Peng refused. The employer got her a second 457 visa.

In the following year, Peng got pregnant and desperately needed permanent residency to raise a family. She asked the employer again for a 186 visa. The employer demanded AUD 100,000 in return. Peng did not pay but managed to get the sponsorship by promising to work for the employer for four more years after acquiring permanent residency.

One thing Peng and her migration agent did not notice was that the employer had changed Peng's position title from acupuncturist to massage therapist on her second 457 visa. The DHA denied the 186 application because Peng had not worked for the sponsoring employer long enough in the current occupation.

Peng attempted another 186 application a couple of years later. It took 2.5 years before the DHA responded to the application. By this time, Peng had been working in Australia for a decade and had a family of three. Eventually, the DHA denied the application again on the ground that the employer did not meet the condition of actively and lawfully operating his franchise business. Peng and her family who were then staying on a bridging visa were ordered to leave Australia in 28 days.

Peng made an appeal to the Administrative Appeal Tribunal. She severed her tie to the employer and reported him to the DHA. She emailed the Department, saying that the employer demanded her as well as her colleagues for money in exchange for visa sponsorship and that those who had yielded to pay acquired permanent residency with no issue and in no time. The only response she got from the DHA was an automatic reply acknowledging the receipt of her email.

Peng later learned from her migration agent that the employer was no longer eligible to sponsor migrant workers and that she had no one to sponsor her for a 186 visa even if her appeal was upheld by the Tribunal. She suspects the employer became ineligible because she reported his visa system manipulation to the DHA and regrets doing so.

Peng's employer made more money from selling visa sponsorship to his employees than selling remedial therapy service to his customers. Peng resisted the employer's rules but followed those of the Government. And yet, it was Peng who got punished in the end. She tells her fellow migrant workers to never report their employers to the Government if they want to stay in Australia.

3.6. We also recommend **the DHA introduce measures to eliminate some of the restrictive visa conditions.** Disadvantaged by the restrictive visa conditions, migrant workers find it extremely difficult to secure a job and often accept whatever terms of employment laid out by their employer. Under such circumstances, they are hardly encouraged to report employer contraventions and fear that reporting their employers would make them subject to retaliatory termination. If retaliatory termination did take place, for example, some migrant workers cannot make unfair dismissal claims because lodgement requires at least 6 months of employment and their visa conditions (e.g. Condition 8547 for working holiday maker visa holders) prohibit them from working for an employer for more than 6 months. Even when one can access the remedies, they have hard time surviving the lengthy and uncertain process after losing the job. Furthermore, in highly networked industries, such as hospitality where exploitation is normalised, it can also result in the whistle blower getting blacklisted from any future job opportunities in the industries. Fewer restrictions to migrant workers' right to work are guaranteed to help them feel more secure and confident to find work and will increase the chances of migrant workers' reporting employer contraventions.

3.7. **The DHA is further recommended to create a new bridging visa with the right to work and help regularise the stay of migrant workers who are victims of workplace exploitation, harassment, or injury.** When their cases are being heard by the Fair Work Commission or by court, when they are assisting the Fair Work Ombudsman with an ongoing investigation, or when they are receiving medical or psychological treatment, most migrant workers are forced to leave Australia in the middle of their lengthy processes. This bridging visa for the victims of wage theft should be regarded as a qualifying substantive visa when the victims apply for another visa afterwards.

3.8. Lastly, we once again recommend **the DHA prioritise reviewing the Assurance Protocol with the Fair Work Ombudsman and strengthening safeguards for victims of migrant labour exploitation.**

4. Part 2—Prohibition on certain employers employing additional non-citizens

4.1. The MWC welcomes the DHA's attention in Part 2 of the Exposure Draft to Taskforce Recommendation 20 that highlights the need to protect potential victims from employers who have been convicted of migrant worker exploitation. We also welcome the principle of Part 2 that holds accountable both a body corporate and a natural person who "has a material role" in the body corporate's decision-making processes.

4.2. Subsection 245AYE of the Bill gives the Minister discretionary power to declare a person to be a "prohibited employer" and temporarily bar them from employing temporary visa holders in addition to their existing employees on temporary visas. When a prohibited employer is found in breach of the law, they are liable for a civil penalty.

4.3. Despite its good intentions, the amendment will have little impact. Exploitative employers are likely to abandon the body corporate that is declared a prohibited employer and open a new business with the intention of continuing exploitative practices against additional migrant workers and avoiding the penalty. When penalised for breaching the law, they will yet again declare the prohibited employer bankrupt and phoenix into a new business.

4.4. **The DHA is strongly recommended to revise Part 2 to hold the owners, shareholders, or members of a body corporate declared prohibited employer personally liable for corporate debts and obligations.**

4.5. At the same time, it must be the DHA's responsibility to monitor prohibited employers against the possibility of contravention. However, the Bill merely makes the Minister publish a list of prohibited employers online and expects migrant workers to stay away from the listed employers. Given that many migrant workers fall prey to exploitation due to an information gap about Australia's industrial relations, it is highly irresponsible of the DHA to expect migrant workers to pay attention to an occasionally updated online list as they struggle to get settled and make a living.

4.6. The Bill does not state what might happen to the temporary visa holders who are found to have been additionally employed by a prohibited employer in breach of the law. Box 2 illustrates the confusions the Bill will cause in the future. If the concept of "prohibited employers" should be introduced, **there must be another amendment to the Act to protect the additional employees from any adverse immigration outcomes as a result of their employer's contravention.** For example, no future amendment to the Migration Regulations 1994 should be made to the effect of not allowing the additional employees to count the work they carried out for a prohibited employer toward meeting their visa conditions. As a principle, the DHA must not disadvantage the additional employees for the Department's own failure to detect the prohibited employer's contravention in advance.

Box 2. A hypothetical scenario of unknowingly working for a prohibited employer

Sheldon (fictional character) came to Australia on a Student (subclass 500) visa to pursue a Master's degree in civil engineering.

As soon as he graduated, he got a full-time fixed-term job offer from an engineering consulting firm in a designated regional area. Working in the area while staying on a Temporary Graduate (subclass 485) visa, he was able to build a good list of references and record of local work experience.

Sheldon wanted to call Australia home. He applied for a Skilled Work Regional (subclass 491) visa now that he scored high enough on the points test with his Australian degree and work experience. There was nothing to stop him from getting settled in Australia when he got the five-year visa and a full-time ongoing position at Big Bang Engineering Pty Ltd in the same designated regional area.

After working for Big Bang Engineering Pty Ltd for three years, Sheldon believed he had met Condition 8579 (Live, study and work in a designated regional area) of his 491 visa and became eligible for permanent residency through the Skilled Regional (subclass 191) visa scheme.

It was only after he submitted the addresses of his employers and workplaces to the DHA that he learned Big Bang Engineering Pty Ltd had been on the DHA's list of prohibited employers since before his employment began.

Sheldon did not know some employers were prohibited from employing people on temporary visas. He also had no ideas he was expected to check the DHA's online list of prohibited employers before accepting a job offer. Now he is extremely worried if his work experience with Big Bang Engineering Pty Ltd would not be counted toward meeting Condition 8579. He is also unsure if he is supposed to report his employer for having employed him (an additional temporary visa holder) as late as now.

4.7. Lastly, it is important to note that **Subsection 245AYE is likely to contribute to the production of a black market in the absence of regular monitoring on the prohibited employers.** Unscrupulous prohibited employers will look for ways to not leave any traces of engagement and continue exploiting vulnerable migrant workers. Migrant workers with no visa with work rights are likely to be targeted. No employment contract, roster, or payslips will be produced. Workers will be paid less than the legal minimum in cash in hand. When one of the workers without documents gets injured at work, it will be extremely difficult to prove the employer's responsibility because there will be no employment record, and no one will acknowledge the employment relationship.

4.8. **An effective way to stop prohibited employers from exploiting additional migrant workers and building a black market for migrant labour is for the DHA to collaborate with the Fair Work Ombudsman and trade unions.** Fair Work Inspectors and trade union officials can regularly check on the prohibited employers as long as the DHA keeps them updated of the list of prohibited employers.

5. Part 3—Use of computer system to verify immigration status

5.1. The MWC is in the view that the amendments in Part 3 of the Exposure Draft could encourage racial profiling and discrimination against migrant workers in the labour market and potentially contribute to the development of a black market for migrant labour.

5.2. It is already a criminal offence to employ a person with no work rights. Employers are required to take reasonable steps to verify workers' visa conditions. Subsections 245AEC and 245AED introduce penalties against a person for failing to confirm migrant workers' visa and work-related conditions on the DHA's online system and engaging them in breach of their visa conditions.

5.3. **We believe the new requirement can potentially contribute to promoting racial profiling.** There is no easy way for one to know whether someone is a non-citizen or not. Employers are likely to demand linguistic and racial minorities to provide information about their migration status to be on the safe side and avoid the penalties. Such a practice could lead to further marginalising members of minority communities and undermine Australia's multiculturalism and social unity.

5.4. Employers that are not familiar with the immigration system already find it too cumbersome to engage migrant workers. **The new requirement will add yet another step to the already complex process of engaging migrant workers.** Employers would develop unnecessary apprehension of the penalties and consequent aversion to engaging migrant workers. They might end up unconsciously screening out persons of colour from job applicants for fear they might get into trouble with employees' migration issues in the future and be found in breach of the Act.

5.5. Notably, it is already difficult for migrant workers to find employers willing to hire them. When the labour market becomes more closed to migrant workers, they could be compelled to endure exploitative working conditions or occupational health and safety hazards, despite the purpose of the Bill of protecting migrant workers.

5.6. **We recommend the DHA delete the amendments in Part 3 in entirety from the Bill.** In their replacement, we recommend the DHA introduce measures to proactively disseminate the message that the standards under the *Fair Work Act 2009* apply to every worker equally, both citizens and non-citizens. We suggest the DHA provide information about workplace rights in community languages each time a visa with right to work is issued. The Government should also facilitate follow-up education for migrant workers upon their arrival by funding trade unions and community legal centres to offer workplace rights workshops in community languages.

6. Conclusion

6.1. The MWC is convinced, based on its expertise, that protecting migrant workers from exploitation cannot be achieved solely by punishing exploitative employers and that punishing the employers is not feasible when migrant workers are not assured of their security.

6.2. Protecting whistle blowers from adverse immigration consequences, addressing the normalisation of labour exploitation, and giving migrant workers power to defend themselves against exploitation, discrimination, and harassment are the fundamental solutions to migrant labour exploitation.

6.3. The MWC strongly recommends that the DHA revise the Bill to that effect.