

SUBMISSION

*Senate Standing Committees on Legal and
Constitutional Affairs*

*Migration Amendment (Strengthening
Employer Compliance) Bill 2023 [Provisions]*

July 2023



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Acknowledgement of country

We acknowledge the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation and the Gadigal and Bedegal people of the Eora Nation, and acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We acknowledge that sovereignty was never ceded, and we support the self-determination of Aboriginal and Torres Strait Islander peoples.

About Migrant Justice Institute

The Migrant Justice Institute is a nonpartisan law and policy organisation that seeks to achieve justice for migrant workers in Australia and globally. An independent non-profit founded in 2021, we are Australia's first (and only) national research and policy organisation dedicated to addressing migrant worker exploitation. We are dedicated to achieving fair treatment and justice for migrant workers globally, and in Australia.

Our rigorous research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We rely on strong relationships with migrant communities, trade unions and legal centres to develop innovative reforms that are grounded in migrants' lived experiences.

We educate government and business on the systemic issues that create a breeding ground for abuse, and we engage collaboratively to implement common-sense reforms. Our work has shaped practices of governments, businesses and international organisations in Asia, the USA and the Middle East, and has driven Australian government policy reforms on wage theft, access to justice, and pandemic-related support for migrant workers.

About Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

Submission authors

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Endorsements

This submission has been endorsed by Anti-Slavery Australia, Australian Lawyers for Human Rights, Be Slavery Free, Business and Human Rights Centre RMIT, Circle Green Community Legal, Josephite Counter-Trafficking Project, Migration Institute of Australia, Office of the Anti-slavery Commissioner, Scarlett Alliance, Settlement Council of Australia, South-East Monash Legal Service, Visa Cancellations Working Group, and WEstjustice.



Office of the
Anti-slavery
Commissioner

VISA
CANCELLATIONS
WORKING GROUP



Migration Institute of Australia



Sisters of Saint Joseph
of the Sacred Heart

JOSEPHITE COUNTER-TRAFFICKING PROJECT



Settlement
Council
of Australia

WEstjustice

Circle Green
Community Legal



Executive summary

Fear of visa cancellation prevents migrant workers from taking action to address exploitation. This increases their vulnerability to wage theft and other abuses by unscrupulous employers. It also prevents them from obtaining their legal entitlements, and keeps exploitation and modern slavery in the shadows where it cannot be detected and addressed by government enforcement agencies.

The proposed amendments to section 116 of the *Migration Act 1958* (Cth) (***Migration Act***) have the ‘aim of protecting exploited temporary migrant workers from visa cancellation’. They propose to amend the general power to cancel temporary visas under subsection 116(1) to provide for regulations that specify matters that a delegate ‘must’, ‘may’ or ‘must not’ take into account and the weight to be afforded to those matters.

The proposed amendments cannot achieve their stated objectives because they do not in fact ensure a temporary migrant’s visa will not be cancelled on this basis. They do not specify that the discretion must be exercised one way or another, and they continue to allow discretionary cancellation of exploited workers’ visas. As such, they cannot provide the certainty that migrant workers need to address workplace exploitation, and they will not enable unions and service providers to assure migrant workers that they can safely enforce their workplace rights without exposing themselves to a risk of visa cancellation.

More than 40 organisations across Australia – including trade unions, legal centres, and business, modern slavery, migrant rights and faith-based groups – have endorsed a preferred model for protection against visa cancellation set out in the [Breaking the Silence](#) report. Under that model, the Minister should issue regulations under subsection 116(2) of the *Migration Act* which provide that: ‘The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.’ The Minister would prescribe that a visa is not to be cancelled in circumstances where the visa-holder produces valid certification that a labour contravention has occurred, and that the worker is taking prescribed action to address it.

A protection against visa cancellation under existing subsection 116(2) provides a far superior solution because it would provide the reliability and certainty migrant workers require in relation to potential visa cancellation on the basis of breaches of work-related conditions, but it would not fetter the Government’s discretion to cancel a migrant worker’s visa on other unrelated grounds. It maintains the integrity of the migration system because certification could only be provided by a limited number of accountable government and non-government entities with no financial incentive and severe consequences for lodging unmeritorious claims.

Recommendation: Amendments to subsection 116(1A) should not be introduced as a vehicle for enacting unreliable discretionary visa protections for exploited migrant workers. We recommend instead that reliable automatic protections be set out in delegated legislation pursuant to existing subsection 116(2) consistent with the *Breaking the Silence* proposal. This requires no amendment to the *Migration Act*.

Overview

We welcome the opportunity to make a submission in relation to these amendments to the *Migration Act*. This submission relates to the proposed amendments to section 116. Those amendments are intended to form a basis for protections from visa cancellation for exploited migrant workers.

Visa fears prevent migrant workers from taking action to address exploitation

Since the 7-Eleven scandal was reported in 2015, there has been consistent evidence of both the widespread exploitation of migrant workers, and the profound chilling effect that the threat of visa cancellation has on those workers. Unscrupulous employers can rely on the threat of visa cancellation to compel migrant workers into substandard and unsafe work, including where there is no objective basis for cancellation of the worker's visa.

In a large-scale survey of temporary migrants conducted by the Migrant Justice Institute in 2018, a quarter reported reluctance to pursue action for breaches of workplace law due to fear of visa cancellation.¹

In recent consultations, the Department of Home Affairs (**DHA**) has pointed out that few student visas are cancelled for breach of the work-related Condition 8105. However, the 7-Eleven experience clearly demonstrated that the fact that cancellation remained possible was sufficient to prevent international students from reporting and addressing workplace exploitation. Regardless of the likelihood of visa cancellation, international students *believe to be credible* their employers' threats that visa cancellation might result from their complaint. Unions and legal service providers must advise international students and other migrant workers that if they have breached the work condition under their visa, it is *possible* that their visa will be cancelled if the breach is brought to light.

Only a guarantee against visa cancellation will allay migrant workers' fears and enable them to feel safe to report exploitation and enforce their labour rights

If the Government is serious about addressing migrant worker exploitation, it is not good enough to create a regime that might protect *some* exploited workers *some* of the time. It must create a regime that protects *all* exploited workers *all* of the time. It must create a protection that can easily be communicated to workers as a guarantee, by those who work most closely with them to address breaches of workplace laws: their trade unions, government regulators and lawyers.

The proposed amendments do not provide such a clearly communicable guarantee. They are therefore inadequate to address the exploitation of migrant workers.

In light of the evidence on migrant workers' visa fears, unions, businesses, migrant rights organisations and modern slavery advocates have consistently called for a *guarantee* against visa cancellation to provide migrant workers with sufficient confidence to enforce their rights. Our report, *Breaking the Silence*, set out a detailed proposal of how such a protection can be achieved by way of subsection 116(2) of the *Migration Act* which provides that the Minister is not to cancel a visa if there exist

¹ Migrant Justice Institute, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 39.

prescribed circumstances in which a visa is not to be cancelled.² That report was endorsed by 40 civil society groups across Australia, including:

- trade unions and worker representatives,
- settlement and ethnic affairs agencies,
- faith-based groups,
- modern slavery and anti-trafficking organisations,
- the NSW Anti-Slavery Commissioner,
- the UN Global Compact Network Australia, and
- community legal centres across the country.

The proposal was also supported by the Grattan Institute.³

All of these organisations have called for a *guarantee* against visa cancellation, rather than a discretion to not cancel a visa, because only a *guarantee* will provide international students and other migrant workers with the surety that they need to come forward. For many, there is too much at stake to risk even the slightest possibility of visa cancellation.

A full outline of our proposed guarantee against visa cancellation, the '**Exploited Worker Visa Guarantee**', is set out in our **Analysis, under Section F, below**.

Without a clear guarantee against visa cancellation, unions and service providers cannot assure exploited migrant workers that their visa will not be cancelled if they expose a visa breach in the context of reporting exploitation to regulators or enforcing their workplace rights. This is why the Assurance Protocol has remained virtually unused, and it is why anything less than a guarantee against visa cancellation will similarly fail to achieve the trust necessary to break migrant workers' silence.

The proposed amendments are intended to allay visa fears and encourage exploited migrant workers to take action

The Explanatory Memorandum to the Bill indicates that the proposed amendments to section 116 are intended to enable exploited migrant workers to trust that their visa will not be cancelled for breaching a work-related condition if they meet certain conditions (presumably related to reporting and/or taking action to address the exploitation). It states that the amendments at Part 6, Div 1, Item 37 of the Bill are intended to:

allow measures such as the Assurance Protocol, which is an administrative arrangement between the FWO and the Department, to be codified in the regulations.⁴

² Laurie Berg, Bassina Farbenblum and Sanmati Verma, *Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation* (Report, February 2023).

³ Grattan Institute, *Short-Changed: How to Stop the Exploitation of Migrant Workers in Australia* (Report, May 2023) paragraph 2.7.

⁴ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 74.

That aim is important, as the Explanatory Memorandum explains, because:

Codifying the Assurance Protocol will give additional assurance to migrant workers that they can seek help without fear of visa cancellation, even if they have breached their work-related visa conditions.⁵

The Statement of Compatibility with Human Rights also indicates that the proposed amendments to section 116 have the ‘aim of protecting exploited temporary migrant workers from visa cancellation’.⁶ It further states:

This amendment follows stakeholder feedback that the Assurance Protocol ... is not trusted amongst exploited migrant workers. Using this new enabling power, the Government will be able to reflect the intent of the Assurance Protocol in the Migration Regulations – that is, to prescribe matters to be taken into account to ensure that a temporary migrant’s visa will not be cancelled for breaching a work-related visa condition if certain criteria are met.⁷

The proposed amendments cannot achieve their stated objectives because they do not in fact ensure a temporary migrant’s visa will not be cancelled on this basis.

Migrant workers and their representatives will not trust the proposed protections under amendments to subsection 116(1A) because they do not provide a reliable safeguard against visa cancellation

Rather than relying on subsection 116(2), the proposed amendments relate to the general power to cancel temporary visas under subsection 116(1). They provide for regulations that specify matters that a delegate ‘must’, ‘may’ or ‘must not’ take into account and the weight to be afforded to those matters.

The proposed amendments do not specify that the discretion must be exercised one way or another, and they continue to allow discretionary cancellation of exploited workers’ visas. As such, they cannot provide the certainty that migrant workers need to address workplace exploitation, and they will not enable unions and service providers to assure migrant workers that they can safely enforce their workplace rights without exposing themselves to a risk of visa cancellation.

Our **Analysis below** explains these deficiencies in more detail, in the context of the section 116 cancellation power, and proposed amendments to subsections 116(1A) and (1B).

Broad union and civil society consensus that the required guarantee against visa cancellation can be simply achieved under subsection 116(2)

There is a simple way to ensure that a temporary migrant’s visa will not be cancelled for breaching a work-related visa condition if certain criteria are met.

⁵ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 74.

⁶ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 81.

⁷ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 93.

Subsection 116(2) of the *Migration Act* provides:

The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.

There is overwhelming support within the trade union movement, civil society, and businesses committed to addressing modern slavery, for a clear and simple guarantee against visa cancellation to be established for exploited workers who address workplace exploitation. This is best achieved by regulations that prescribe circumstances in which a visa is not to be cancelled under subsection 116(2).

The full details of the **Exploited Worker Visa Guarantee**, and the circumstances that should be prescribed, are set out in the [Breaking the Silence](#) report. These are summarised in our **Analysis, under Section F, below**.

Recommendation: Amendments to subsection 116(1A) should not be introduced as a vehicle for enacting unreliable discretionary visa protections for exploited migrant workers. We recommend instead that reliable protections be set out in delegated legislation pursuant to existing subsection 116(2) consistent with the *Breaking the Silence* proposal. This requires no amendment to the *Migration Act*.

Analysis of proposed revised subsections 116(1A) and 116(1B) and our alternate preferred model

A. Overview of subsection 116(1) and 116(1A)

Subsection 116(1) of the *Migration Act* contains a general cancellation power that operates in relation to temporary visas.⁸ The provision allows for a temporary visa to be cancelled on one of the eight grounds set out at paragraphs 116(1)(a)-(fa), and the additional 31 grounds prescribed for the purpose of paragraph 116(1)(g) at regulation 2.43(1) of the *Migration Regulations 1994* (Cth) (***Migration Regulations***).

Visa cancellation under subsection 116(1) involves a two-step process:

1. First, a delegate of the Minister for Home Affairs must decide whether grounds for cancellation arise under the various heads specified under section 116; and
2. Second, if the delegate is satisfied that such grounds do arise, then she must decide, based on her own discretion, whether or not to cancel the visa.

Subsection 116(1A) further provides:

The regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in paragraph (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.⁹

Current departmental policy provides ten matters that delegates must 'take into account' when exercising the discretion to cancel a visa under section 116 of the *Migration Act*.¹⁰

B. Overview of proposed revised subsections 116(1A) and 116(1B)

Part 6, Div 1, Item 37 of the Bill proposes to replace current subsection 116(1A) with a broader power to specify, in the *Migration Regulations*, matters which the Minister (or her delegate) *may*, *must* or *must not* have regard in determining whether they are satisfied as mentioned in subsection 116(1) and the relative weight to be given to those matters.

The Bill also proposes to insert a new subsection 116(1B) which would provide that, to avoid all doubt, the matters set out under new subsection 116(1A) would not limit the matters to which the Minister or

⁸ *Migration Act 1958* (Cth) s 117(2) provides that a permanent visa cannot be cancelled under s 116 if the holder is in the 'migration zone' ie in Australia.

⁹ Paragraph (1)(fa) relates to cancellation of a student visa if the Minister is satisfied of certain matters. For the purposes of current s 116(1A), the 'prescribed matters' are set out at r 2.43 of the *Migration Regulations 1994* (Cth).

¹⁰ These are: The purpose of the visa holder's travel to and stay in Australia; The extent of compliance with visa conditions; The degree of hardship that may be caused to the visa holder and any family members; The circumstances in which the ground for cancellation arose; The visa holder's past and present behaviour towards DHA; Whether there are persons in Australia whose visas would, or may, be cancelled under s 140 of the Migration Act; Whether there are mandatory legal consequences to a cancellation decision; and Whether Australia has obligations under relevant international agreements that would be breached as a result of the visa cancellation.

his delegate could have regard when exercising the powers to cancel a visa under subsection 116(1), (1AC), (1AA) or (1AB) of the *Migration Act*.

C. Amendments will not be trusted by migrant workers because they retain the delegate's discretion, providing no guarantee against cancellation

Under the proposed amendments, the Minister (and their delegate) would retain the discretion to cancel a worker's visa, even if the worker produces credible evidence of exploitation at work and evidence that they are taking action to enforce their work rights.

In the absence of an exposure draft of the regulations, it is not possible to fully appraise the Government's proposed scheme to protect exploited workers from visa cancellation. However, even if regulations were drafted in the strongest possible terms – for instance, to require that a delegate *must* have regard to evidence of workplace exploitation, and afford that matter *significant weight* in favour of the visa-holder – the framework would still permit the delegate to cancel the visa of an exploited worker and fall short of a guarantee or assurance against cancellation.

Proposed subsection 116(1B) puts beyond doubt that the delegate is not limited in the matters to which it may have regard.

Indeed, if regulations were to be worded even more strongly than this, those regulations may be *ultra vires* the power in proposed subsection 116(1A).¹¹ This is because proposed subsection 116(1A) provides the Minister with power to make regulations which fetter the delegate's discretion only in relation to mandatory considerations to be taken into account and the weight that must be given to these. Subsection 116(1A) leaves intact the delegate's broad discretion as to whether or not to cancel the visa. However, if, for example, regulations were to provide that a certain matter (such as evidence of workplace exploitation) must be given *determinative* weight, this would have the effect that a visa could not be cancelled in such circumstances. Such regulations could be found to be inconsistent with the power in subsection 116(1A) to make the regulations, because they would unduly fetter the delegate's broad discretion as to whether or not to cancel the visa, which subsection 116(1A) preserves.

Assuming, then, that regulations for the purposes of amended subsection 116(1A)(c) would, at most, require *significant* weight to be given to evidence of workplace exploitation, subsection 116(1B) as inserted by the Bill would allow that consideration to be displaced by another matter of 'significant weight,' at the delegate's broad discretion. In cancellation proceedings, it is entirely commonplace for a matter to be afforded 'significant' favourable weight by a decision-maker, while the overall balance of discretionary factors weighs against a visa-holder.¹²

¹¹ See, for example, Mark Robinson SC, *Judicial Review of Delegated Legislation* (Paper delivered to NSW Bar Association CPD Conference, 18 August 2014).

¹² See, for example: *JVD and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2022] AATA 2830; *RNSQ and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2022] AATA 4712.

Scenario: An exploited international student's decision-making after passage of proposed subsection 116(1A) and related regulations

Paula, an international student, is employed at a takeaway shop. For several months she has been earning a flat rate of \$15 per hour, around half the minimum wage to which she is entitled as a casual employee. She is aware that she is now restricted to working up to 48 hours per fortnight while her course is in session. However, unable to pay her increased rent on this unlawfully low wage, she regularly works up to 70 hours per fortnight in order to remain in Sydney and complete her architecture degree.

Paula attends a legal rights information session at her university and approaches the legal centre on campus to explore whether she should try to recover her entitlements and report the exploitation to the Fair Work Ombudsman.

The legal centre lawyer advises Paula that if she takes legal action her visa breach may come to the attention of the Department of Home Affairs – her employer could do her in in retaliation for a letter of demand from the legal centre, or her breach could be detected if the matter proceeds to open court.

Her lawyer then advises that, as a result of subsection 116(1A), when deciding whether to cancel her visa, the Department's delegate is now required to have regard to evidence that Paula is taking action against an exploitative employer and give that significant weight. In addition, the Department has said that it generally does not cancel a worker's visa in the context of workplace exploitation and it is likely that the delegate will not cancel hers. However, the lawyer advises that the delegate may also take into account the magnitude of hours she has worked in breach of Condition 8105 over an extended period, and may find that this significant consideration outweighs the other significant consideration of evidence of exploitation and her efforts to enforce her rights. *The lawyer is unable to guarantee Paula that her visa will not be cancelled.*

Nothing is more important to Paula than completing her architecture degree. Her family has saved for years to make this dream possible for her, and she will not contemplate taking any action that could put this in jeopardy. *She accepts this as her fate in Australia.*

D. Codifying the Assurance Protocol

As noted above, the Explanatory Memorandum to the Bill indicates that its provisions are intended to allow the Assurance Protocol to be codified in the regulations, which 'will give additional assurance to migrant workers that they can seek help without fear of visa cancellation, even if they have breached their work-related visa conditions.'¹³

¹³ Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 74.

The Assurance Protocol is an arrangement between the Fair Work Ombudsman (FWO) and DHA which provides that, where a visa-holder is assisting the FWO with an investigation and has breached a work-related condition of their visa but there are no other grounds for cancellation, they may seek an 'assurance' from DHA that their visa will not be cancelled.¹⁴ It is widely accepted that the Assurance Protocol has been a failure, with only 79 referrals under the initiative since it was introduced in 2017.¹⁵ It has been the subject of sustained criticism across trade unions and the community legal sector for years, and its ineffectiveness has been acknowledged by the Immigration Minister.¹⁶

The Explanatory Memorandum mistakenly assumes that the deficiency of the Assurance Protocol is primarily that it has not been 'codified' in legislation. However, the lack of legislative basis is only one of numerous fundamental problems with the Protocol. Other deficiencies include:

- It is available only to workers who are 'helping [the FWO] with [their] inquiries'.¹⁷ It is therefore, apparently, not available for exploited workers in relation to whom the FWO is not making further inquiries due to inadequate evidence (especially for workers underpaid in cash), lack of agency resources, different agency priorities or other reasons. In reality, the FWO is resourced to pursue only a small number of cases and declines involvement in others. As a result, availability of the Protocol is speculative and largely outside the worker's control.
- The Protocol is also not available to workers who wish to approach other agencies to report or seek assistance in relation to other workplace harms, including workplace health and safety breaches, sexual harassment or bullying, breaches of licensing conditions by labour hire firms, breaches of immigration laws or other abuses that are not within the FWO's jurisdiction.
- There is a complete lack of transparency, accountability and predictability in the process for accessing the protection, and eligibility criteria for the Protocol appear to have been inconsistently applied. There is no clear appeal process.
- Visa protections are not available to workers who seek to address their exploitation through union action or a legal claim in a court or the Fair Work Commission.
- No protections are available for a visa holder whose employer reports the visa breach to DHA in retaliation against the worker's complaint or claim.

These weaknesses cannot be cured by codification alone. The contingency of availability of protection on the FWO taking action, and the unreliability and lack of transparency in the application process, would still render it unreliable to workers and highly limited in relation to the number of workers who could access it and the situations in which they could invoke it.

¹⁴ Fair Work Ombudsman, [Visa Protections – the Assurance Protocol](#) (Web Page).

¹⁵ Minister's Second Reading Speech for the Migration Amendment (Strengthening Employer Compliance) Bill 2023: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2023, 10.

¹⁶ Minister's Second Reading Speech for the Migration Amendment (Strengthening Employer Compliance) Bill 2023: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2023, 10.

¹⁷ Fair Work Ombudsman, [Visa Protections – the Assurance Protocol](#) (Web Page).

Case study from Migrant Workers Centre: Workers not Covered by Assurance Protocol

Sunil, an international student, is employed at a convenience store. One day, he sees a poster from the Migrant Workers Centre in Melbourne with information about penalty rates, and realises that he is being underpaid – he receives a flat hourly rate even when he works overnight. He decides to take a copy of that poster to his employer, to try and figure out if there has been some mistake.

His employer, whose business relies on underpaying students, responds poorly to Sunil's approach. The employer terminates his employment, tells him never to return to the store and, for good measure, calls the Department of Home Affairs to report that Sunil has been working in excess of 40 hours per fortnight.

After this, Sunil is left shocked and looking for alternative work. The Migrant Workers Centre is assisting him to pursue his legal entitlements but he doesn't know that his employer has reported him to the Department.

Some weeks later, Sunil receives a 'Notice of Intention to Consider Cancellation.' He has never contacted the Fair Work Ombudsman or any other government regulator about his employment. The Notice provides him with 7 days to respond.

E. Amendments suffer from ambiguity in drafting

Finally, in addition to the concerns raised above, there is a further technical difficulty in relation to the drafting of amended subsection 116(1A). As mentioned above, visa cancellation under existing subsection 116(1) involves a two-step process where the delegate first must be satisfied that a ground for cancellation arises under the various paragraphs in subsection 116(1), and, once satisfied, then weighs various considerations and exercises discretion as to whether or not to cancel the visa. Proposed subsection 116(1A) empowers the Minister to make regulations which prescribe matters to which the Minister must, or must not, have regard in determining *whether the Minister is satisfied* as mentioned in the subsections 116(1), (1AC), (AA) or (AB) (emphasis added).

This suggests that the regulations are intended to prescribe matters going to the first part of the exercise – the formation of a state of satisfaction that there is a ground for cancellation set out in subsection 116(1), rather than the second step, involving the exercise of discretion as to whether or not to cancel the visa. It is difficult to conceptualise how the regulations would function to require the delegate to consider evidence of workplace exploitation when determining whether the visa-holder has breached their visa condition, and therefore whether they are satisfied that a ground for cancellation arises at paragraph 116(1)(c).

F. Preferred Model – An Exploited Worker Visa Guarantee

More than 40 organisations across Australia – including trade unions, legal centres, business, modern slavery, migrant rights and faith-based groups – have endorsed a preferred model for protection against visa cancellation set out in the [Breaking the Silence](#) report.

Under that model, the Minister should issue regulations under subsection 116(2) of the *Migration Act* which would prescribe that a visa is to not be cancelled in circumstances where the visa-holder produces valid certification that a labour contravention has occurred, and that the worker is taking action to address it.

The key elements of this model are as follows:

- **Eligibility for certification:** this protection against visa cancellation is available to migrant workers whose visa would be cancelled due to breach of work-related visa conditions.
- **Certifying entities and conditions for certification:** the protection is available when the visa-holder provides evidence of a meritorious claim that a contravention has occurred, and that the worker is taking action to address it. Regulations should stipulate that this evidence takes the form of a certification by any one of the following:
 - a government enforcement authority (e.g., the FWO, state workplace health and safety authorities, labour hire licensing authorities etc) certifying that the authority is conducting inquiries in relation to the visa-holder's employment conditions; or
 - a court, tribunal, or commission certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
 - certification by an employment lawyer in a non-profit practice (including a community legal centre (CLC), an education provider legal service, a union, or a corporate pro bono practice), or an accredited specialist employment lawyer, that there is evidence of a prima facie claim or evidence of a proper basis for a claim.
- **Type of workplace exploitation:** Regulations should specify that the visa-holder's claim must be a 'non-trivial' contravention of labour law. Regulations or a Ministerial Direction should specify a list of workplace contraventions that rise beyond a trivial breach to trigger this protection. For instance, unpaid entitlements might be required to exceed \$2,000.

This proposal has a number of critical benefits:

1. It offers a robust protection against visa cancellation which can be easily communicated to visa holders, to provide the certainty they require to take action for breaches of workplace law.
2. It places the parties with greatest knowledge of workplace law – regulators, courts, tribunals and employment lawyers in non-profit practice or with specialist accreditation – at the heart of establishing breaches and encouraging action by visa-holders.
3. This model provides new incentives for a 'village' to collaboratively enforce labour laws (including private expert employment lawyers, CLCs, university lawyers and unions), without substantially increasing resourcing to the FWO and other government enforcement agencies.
4. The model does not rely on DHA delegates to evaluate breaches of labour law, which they are ill-equipped to do. The involvement of immigration authorities in assessing and establishing workplace breaches has been identified as a key weakness of similar visa protection schemes in Canada.¹⁸ The automatic application of the protection to properly certified claims would also

¹⁸ Amanda Aziz, Migrant Workers Centre and the Law Foundation of British Columbia, *A Promise of Protection? An Assessment of IRCC Decision-Making under the Vulnerable Worker Open Work Permit Program* (Report, 2022).

- require limited DHA resources compared with a discretionary model under which the Minister's delegate would need to undertake a complex consideration and evaluation of various factors.
5. DHA would be better able to enforce existing and new employer sanctions because visa holders could be required to notify DHA of the outcome of claims that form the basis of the visa. Upon grant of these protections, DHA might be given power to issue a warning to an employer that they may be placed on the Prohibited Employers list.

The proposed reforms contain a range of measures to protect the integrity of the migration system and minimise risks of misuse of the protections. Certification of the bona fides of a claim must be provided by either a government agency or a lawyer at a union, community legal centre, education provider or pro bono practice, none of whom have a financial incentive to falsely certify a claim. Certification can also be provided by an accredited expert employment lawyer, who is well-known in the employment law community and would face great reputational risk, as well as professional sanction, for providing a false certification. Certification would be in the form of a statutory declaration – exposing the declarant to penalties for perjury and disciplinary sanction as a legal professional.

A protection against visa cancellation under existing subsection 116(2) provides an elegant solution because it would provide the reliability and certainty migrant workers require in relation to potential visa cancellation on the basis of breaches of work-related conditions, but it would not fetter the government's discretion to cancel and migrant worker's visa on other unrelated grounds. For example, a delegate would be free to cancel the visa of a migrant worker who had falsified a visa application under the general cancellation power at section 109 (available in relation to incorrect information) or committed a crime under the cancellation power at section 501 (relating to character).

For these reasons, we oppose the amendments to subsection 116(1A) as a vehicle for enacting visa protections for exploited migrant workers. We recommend instead that these protections be set out in delegated legislation pursuant to existing subsection 116(2). This requires no amendment to the *Migration Act*.

Recommendation: Amendments to subsection 116(1A) should not be introduced as a vehicle for enacting unreliable discretionary visa protections for exploited migrant workers. We recommend instead that reliable protections be set out in delegated legislation pursuant to existing subsection 116(2) consistent with the Breaking the Silence proposal. This requires no amendment to the Migration Act.