SUPPLEMENTARY SUBMISSION

Senate Standing Committees on Legal and Constitutional Affairs

Migration Amendment (Strengthening Employer Compliance) Bill 2023

August 2023

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.

Submission authors

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Overview

This supplementary submission clarifies two key points raised in Migrant Justice Institute's submission to the Inquiry into the *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (**the Bill**), in light of questions raised at the Hearing for this Inquiry on 21 August 2023.

1. The proposed new employer sanctions under sections 245AAB and 245AAC should, and are apparently intended to, prohibit employers' coercion of migrant workers to accept "arrangements in relation to work" that extend beyond performance of work. This should include, for example, demanding the migrant worker accept sexual advances, unsafe living conditions or passport confiscation in return for work or documents the worker needs in order to meet a visa requirement. The provisions are drafted in a manner that may foreclose interpretation of "arrangements in relation to work" to extend beyond performance of work. This can be cured by amending paragraph (1)(c) in each offence to omit the reference to "the work", and including a new definition of "arrangement in relation to work", or a clear explanation in the Explanatory Memorandum.

2. The proposed new Prohibited Employer declaration provisions do not apply to contraventions of key civil remedy provisions of the *Fair Work Act 2009* (Cth) (***FW Act***) by persons 'involved in' a contravention. This would exclude, for example, company directors and other responsible individuals within a company who have had a Fair Work order (**FW order**) made against them by a court due to their involvement in the contravention of the *FW Act* as an accessory. If the director set up another company, they could continue to engage non-citizens – a loophole that encourages corporate phoenixing.

   We propose that both the employing entity, and other persons found by a court to be accessories to a contravention, be subject to a Migrant Worker Sanction and the Minister be able to exercise discretion to designate a director or other accessory to be a Prohibited Employer in particularly egregious circumstances when such designation is warranted. This is appropriate because the individual would need to have been found by a court to be an accessory to a contravention under section 550 of the *FW Act*, based on a high standard that often amounts to actual knowledge. There are very few court orders against individuals as accessories each year. Moreover, the Minister retains the discretion to not designate the accessory to be a Prohibited Employer if they determine this is unwarranted in the circumstances.

   In the hearing for this Inquiry, a Department of Home Affairs (**DHA**) representative indicated that contraventions that are Migrant Worker Sanctions for the purpose of a Prohibited Employer designation also apply to company directors and other responsible individuals. This is correct in respect of some contraventions (for example if an individual Director is found to have breached relevant provisions of the *Migration Act 1958* (Cth) (***Migration Act***)). However, on our reading of the Bill, it appears that there are no provisions that provide for the inclusion of accessories to breaches of the most significant civil remedy provisions of the *FW Act*. If our interpretation is incorrect or not the intention of the drafters, we respectfully suggest that there is a need for amendments to clarify the scope and application of these sections.

Summary of Recommendations

Recommendation 1: Introduce a broad definition of "arrangement in relation to work" to include any arrangement in the context of a work relationship that is harmful or has negative consequences for the non-citizen, including, for example, accepting a sexual advance or agreeing to unsafe accommodation conditions. This should be included in proposed sections 245AAB and 245AAC, or alternatively, clarified in the Explanatory Memorandum.

Recommendation 2: Amend proposed paragraphs 245AAB(1)(c) and 245AAC(1)(c) to omit the reference to "the work". For example, the provision could be re-drafted as: "the arrangement is to be performed by the worker in Australia, whether for the first person or someone else".

Recommendation 3: If the Government decides to proceed with a Prohibited Employers List, directors and other accessories to contraventions of the *FW Act* should not be excluded from its scope. To achieve this outcome, proposed section 245AYH could be amended to omit the condition that "the FW order was not made on the basis that the person was a person who was involved in the contravention" in paragraphs (1)(b), (2)(b), (3)(a)(ii), (3)(b)(ii) and (4)(b).

1. Scope of "arrangement in relation to work" in proposed sections 245AAB and 245AAC is problematically restricted

Employers sometimes coerce migrant workers into enduring egregious treatment within the work context that goes beyond a 'traditional' understanding of work and work arrangements. This may include, for example, demanding the migrant worker accept sexual advances or unsafe living conditions in return for work or documents the worker needs in order to meet a visa requirement.

In our earlier submission to this Inquiry we recommended that an expansive definition of the phrase "arrangement in relation to work" should be inserted within proposed sections 245AAB and 245AAC to capture this egregious conduct, or otherwise included in the Explanatory Memorandum. "Arrangement in relation to work" should be defined broadly to include any arrangement in the context of a work relationship that is harmful or has negative consequences for the non-citizen, including, for example, accepting a sexual advance or agreeing to unsafe accommodation conditions, as well as agreeing to poor working conditions.

An expansive interpretation of "arrangement in relation to work" is consistent with the intent of the provision in the Explanatory Memorandum and the new language proposed to be inserted before paragaph 245AA(1)(a)

An expansive interpretation of "arrangement in relation to work" is consistent with the proposed description of the new offences to be inserted before paragraph 245AA(1)(a):

> **Before paragraph 245AA(1)(a)**
>
> Insert:
>
> (aa) where a person coerces, or exerts undue influence or undue pressure on, a lawful non-citizen to accept or agree to a work arrangement:
>
> (i) involving a breach of a work-related condition applying to a visa held by the lawful non-citizen; or
>
> (ii) to avoid an adverse effect on the lawful non-citizen's status as a lawful non-citizen; or
>
> (iii) to satisfy certain requirements to provide information or documents about work the lawful non-citizen has done in Australia;
>
> (ab) where a person coerces, or exerts undue influence or undue pressure on, an unlawful non-citizen to accept or agree to a work arrangement to avoid an adverse effect on the unlawful non-citizen's continued presence in Australia;

An expansive definition is also consistent with the broad intent of the provision set out in the Explanatory Memorandum:

> The purpose of criminalising coercion, undue influence and undue pressure in this offence is to target conduct that may be characterised as excessive, unfair or exploitative.[1]

[1] Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 8.

Proposed sections 245AAB(1)(c) and 245AAC(1)(c) problematically, and apparently unintentionally, confine "arrangement in relation to work" to the performance of work

Subsequent to our original submission, we have discovered that proposed paragraphs 245AAB(1)(c) and 245AAC(1)(c) may not in fact allow "arrangement in relation to work" to be interpreted to cover arrangements beyond the performance of work itself.

Proposed subsection 245AAB(1) provides:

245AAB Coercing etc. an unlawful non citizen to work—adverse effect on presence in Australia

(1) A person (the first person) contravenes this subsection if:
- (a) the first person coerces, or exerts undue influence or undue pressure on, another person (the worker) to accept or agree to an arrangement in relation to work; and
- (b) the worker is an unlawful non citizen; and
- (c) the arrangement provides for the work to be done by the worker in Australia, whether for the first person or someone else; and
- (d) the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement, there will be an adverse effect on the worker's continued presence in Australia.

Proposed subsection 245AAC(1) similarly provides:

245AAC Coercing etc. a lawful non-citizen to work—adverse effect on status etc.

(1) A person (the first person) contravenes this subsection if:
- (a) the first person coerces, or exerts undue influence or undue pressure on, another person (the worker) to accept or agree to an arrangement in relation to work; and
- (b) the worker is a lawful non-citizen (other than a holder of a permanent visa); and
- (c) the arrangement provides for the work to be done by the worker in Australia, whether for the first person or someone else; and
- (d) the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement:
  - (i) there will be an adverse effect on the worker's status as a lawful non-citizen; or
  - (ii) the worker will be unable to provide information or documents about work the worker has done in Australia that the worker is required, under this Act or the regulations, to provide in connection with a visa held by the worker or an application for a visa by the worker.

When asked at the Hearing for this Inquiry on 21 August 2023 about the coverage of these offences of harmful treatment beyond the traditional notion of a 'work arrangement', a representative for DHA confirmed:

> The main intent of this new penalty, the criminal and civil penalty, is around employers that are using that position either to coerce or unduly influence the worker to breach a condition of their visa or to threaten them with a consequence.[2]

However, it may not be possible to interpret this provision consistent with this intent. Because paragraph (1)(c) in each provision refers to "the work", this would suggest that "arrangement in relation to work" may not be interpreted broadly to include egregious coercive "arrangements" that do not involve the performance of work. These may include, for example, coercion to accept sexual advances, or unsafe accommodation arrangements such as a requirement to live in the employer's home or in overcrowded or dangerous conditions such as shipping containers.

Paragraph (1)(c) was not included in an almost identical provision within the Migration Amendment (Protecting Migrant Workers) Bill 2021 (Cth) introduced by the previous government. We suspect it was included here to clarify that the offence relates only to an arrangement that is performed, or to be performed, *in Australia*, as opposed to overseas. However, it was drafted in a manner that unintentionally confined the interpretation of "arrangement in relation to work" to the performance of work.

Recommendation

To cure this defect, we recommend that paragraph (1)(c) of proposed sections 245AAB and 245AAC be amended to omit the reference to "the work".

Recommendation 1: Introduce a broad definition of "arrangement in relation to work" to include any arrangement in the context of a work relationship that is harmful or has negative consequences for the non-citizen, including, for example, accepting a sexual advance or agreeing to unsafe accommodation conditions. This should be included in proposed sections 245AAB and 245AAC, or alternatively, clarified in the Explanatory Memorandum.

Recommendation 2: Amend proposed paragraphs 245AAB(1)(c) and 245AAC(1)(c) to omit the reference to "the work". For example, the provision could be re-drafted as: "the arrangement is to be performed by the worker in Australia, whether for the first person or someone else".

[2] Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 21 August 2023, 56 (Mr David Gavin).

2. Exclusion of accessories undermines potential impact of Prohibited Employer provisions

Proposed section 245AYL introduces a criminal offence and civil penalty where a 'Prohibited Employer' allows a temporary visa holder or non-citizen who does not hold a visa to begin work. Pursuant to section 245AYA, the Minister may declare a 'person' to be a Prohibited Employer where the employer is subject to a 'Migrant Worker Sanction' (**MWS**) (and no more than 5 years have passed since the person became subject to that sanction).

There are several proposed sections that set out when an employer is subject to a MWS. These include: being subject to a bar on sponsoring migrant workers (section 245AYE); conviction for a work-related offence (section 245AYF); contravention of civil penalties of the *Migration Act* (subsection 245AYG(1)) or a court order for pecuniary penalties for breach of a relevant workplace law (subsection 245AYG(2)); an enforceable undertaking in relation to certain provisions of the *FW Act* (section 245AYI); and failure to comply with certain compliance notices under the *FW Act* (section 245AYJ).

Section 245AYH inappropriately excludes company directors and others who are subject to a Fair Work order as an accessory to a contravention of the *Fair Work Act 2009* (Cth)

Proposed section 245AYH sets out the circumstances when a person may be subject to a MWS for contravention of certain civil remedy provisions of the *FW Act*. These include underpayment of migrant workers, advertising non-compliant rates of pay, and contravention of compliance notices for a range of key *FW Act* provisions.

Each of proposed subsections 245AYH(1) to (4) specifically excludes persons who are subject to a FW order "on the basis that the person was a person involved in the contravention." This would exclude, for example, company directors and other responsible individuals within a company who have had a FW order made against them by a court due to their involvement in the contravention of the *FW Act* as an accessory.

In contrast to proposed subsections (1) to (4), subsection (6) enables an accessory to be subject to a MWS but only in relation to 'Other contraventions' prescribed by regulation. Given the express exclusion contained in subsections (1) to (4), and the title of subsection 6 ('Other contraventions'), it is unlikely that regulations would include any of the most important contraventions listed in subsections (1) to (4). Indeed, the Explanatory Memorandum describes the purpose of subsections (5) and (6) as enabling the Minister to respond to new and emerging issues and contraventions:

> *The purpose of these regulation-making powers is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation. While the power is limited in terms of provisions that can be prescribed, being civil remedy provisions in the Fair Work Act, it is expressed broadly in terms of the circumstances that can be prescribed. The intention is to predominately cover circumstances that that relate to migrant workers, however noting that other circumstances may arise and that can be appropriate to cover to ensure the overarching*

> *scheme continues to operate as intended and remains fit for purpose. Regulations made under these provisions will be subject to disallowance.*[3]

The effect of the current provisions is that even if an individual director is found by a court to be the controlling mind of a company, and intimately involved in serious contraventions of civil remedy provisions of the *FW Act*, they cannot be considered for inclusion on the Prohibited Employer list unless the provision is prescribed in future regulations.

The Explanatory Memorandum indicates that the exclusion of 'a person involved in the contravention' is intended to ensure that the provisions target a person who 'was not an accessory, rather was the main contravener'.[4] However, as set out in our first submission, in many cases, the accessory under section 550 of the *FW Act* could in fact be considered a or the main contravener. Under that section, a person who is found to be an accessory is found to have contravened the relevant provision – effectively deeming them to also be a contravener.

The threshold for finding an entity to be an accessory under section 550 of the *FW Act* is extremely high – often requiring that the court find that the accessory had 'actual knowledge' of the contravention. For example, if a worker is employed by a small business that is subsequently deregistered, the sole director may be found to be an accessory where they were instrumental in orchestrating the exploitation. Under proposed section 245AYH, although the (now deregistered) employer could be named a Prohibited Employer, the director could not be named. If the director set up another company, they could continue to engage non-citizens. As such, the proposed provision encourages corporate phoenixing to get around a Prohibited Employer designation.

Company directors and other accessories to contraventions of civil remedy provisions of the *Fair Work Act 2009* (Cth) are not adequately captured by the other proposed grounds for a migrant worker sanction

In addition to proposed section 245AYH, there are two other proposed sections that provide for a MWS in respect of contraventions of civil remedy provisions of the *FW Act*. However, neither of these sections are likely to capture unlawful behaviour of accessories often, or at all.

Proposed section 245AYI provides that a person is subject to a MWS if the Fair Work Ombudsman (**FWO**) has accepted an undertaking given by the person and certain additional conditions are met. Relevantly, the provisions all require the person to be the employer of the worker. Under proposed subsections (1) to (3), the undertaking must be made in relation to a contravention of the *FW Act* which relates 'wholly or partly, to an employee, prospective employee or former employee of the person'. Subsection (4) requires that the contravention 'related, wholly or partly, to an employee of the person'. Subsections (5) and (6) relate to contraventions of 'employer' obligations in relation to advertising pay rates, and subsection (7) simply provides for further circumstances to be covered by regulation. This means that accessories are broadly excluded from the remit of this proposed section, and individuals may only be captured if they are directly employing the exploited worker. In any event, the FWO generally enters into enforceable undertakings with companies, not individuals.

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[3] Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 38.
[4] Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) 37.

Proposed section 245AYJ provides that a person is subject to a MWS if the person fails to comply with a FWO compliance notice in certain circumstances. Once again, the provisions require the person to be the employer of the worker. Under subsections (1) to (2) the notice must be made in relation to a contravention of the *FW Act* which relates 'wholly or partly, to an employee of the person'.

The legislation contains two safeguards against unfair inclusion of company directors and others with minimal involvement in a contravention

We propose that both the employing entity, and other persons found by a court to be accessories to a contravention, be subject to a MWS and the Minister be able to exercise discretion to designate a director or other accessory to be a Prohibited Employer in particularly egregious circumstances when such designation is warranted.

Removing the exclusion of accessories from proposed section 245AYH would not lead to unfair consequences for directors or others with minimal knowledge or involvement in a contravention, for two reasons.

First, as discussed above, the person would need to have been found by a court to be an accessory to a contravention under section 550 of the *FW Act*, based on a high standard that often amounts to actual knowledge. There are very few court orders against individuals as accessories each year.

Second, the Minister is not required to designate a person to be a Prohibited Employer. This is discretionary and the Minister may refrain from a designation in instances where they consider it inappropriate.

Recommendation

For these reasons, if the Government decides to proceed with this scheme, we recommend removal of the exclusion of accessories in subsections 245AYH(1) to (4).

Recommendation 3: If the Government decides to proceed with a Prohibited Employers List, directors and other accessories to contraventions of the *FW Act* should not be excluded from its scope. To achieve this outcome, proposed section 245AYH could be amended to omit the condition that "the FW order was not made on the basis that the person was a person who was involved in the contravention" in paragraphs (1)(b), (2)(b), (3)(a)(ii), (3)(b)(ii) and (4)(b).

Conclusion

Thank you for the opportunity to comment on this Bill.

We would welcome the opportunity to discuss this submission and our further recommendations with the Committee and look forward to working with the Government to develop further reforms.

Sincerely,

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