Proposal for Whistleblower Protections for Migrant Workers: Frequently Asked Questions

The Migration Bill to be introduced in 2023 presents an opportunity for this government to make serious inroads into the otherwise intractable problem of migrant workers in Australia enduring exploitation in the shadows. Our body of research reveals that exploitation and underpayment of migrant workers is endemic across visa categories – including international students, backpackers, employer-sponsored, and skilled workers – and is closely linked with visa insecurity and employer dependency. These endemic drivers of exploitation must be urgently addressed to restore public confidence in the migration system and provide the necessary protections to people who choose to migrate to Australia.

We have drafted a proposal setting out two reforms that will help to bring these workers out of the shadows and hold exploitative employers to account.

Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation proposes the introduction of:

1. protection from visa cancellation for exploited migrant workers who have breached their visa but take action against their employer, and
2. a short-term visa with work rights to pursue a claim in Australia.

Q1. What are the benefits of these whistleblower protections?

1. Employers of temporary visa holders will be on notice that an exploited worker may take action and the employer can no longer rely on the worker's silence (unlike current migration settings which actively disincentivise migrant worker reporting).
2. The protections provide new incentives for a 'village' to collaboratively enforce labour laws (including private expert employment lawyers, CLCs and unions), without substantially increasing resourcing to the Fair Work Ombudsman (FWO) and other government enforcement agencies.
3. At the same time, this new intelligence will flow to the FWO since reporting to FWO (or another relevant government agency) is required for those workers who take action through a lawyer or union.
4. The Department of Home Affairs (DHA) would be better able to enforce existing and new employer sanctions because visa holders would be required to notify DHA of the outcome of claims that form the basis of the visa. Employers found to have breached Australian labour laws could be placed on a proposed Prohibited List of Employers for prospective migrant workers if such a list were introduced. Alternatively, 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.

Q2. Is it sufficient to introduce either protection from cancellation or the short-term visa, or do the two proposals address different situations?

These protections would be used by different temporary migrant workers in different circumstances.

The ***protection from visa cancellation*** would primarily be used by *international students* and their spouses who have breached the 40-hour work restriction on their visa and fear detection if they come forward. It would also be utilised by *Bridging visa holders* subject to work-restricting conditions – for instance, former international students who hold Bridging A visas in connection with a further visa application, subject to the 40-hour work limitation condition (8105).

The ***short-term visa*** would likely be used by:

- *Temporary Skills Shortage* visa holders who fear loss of sponsorship if they bring a claim against their sponsoring employer during their term of employment. If their sponsorship ends or is terminated, they would require a visa to regularise their stay for a short period of time in which to pursue a claim and identify a new sponsor before transitioning back onto a TSS visa. (While, alternatively, a TSS visa holder might seek protection from visa cancellation like international students, this would only address the worker's own breach of their visa condition and not be sufficient to address the invalidity of the visa on the basis of the employer's noncompliance and resulting termination of sponsorship);
- *Working Holiday Makers*, international students and other temporary visa holders who have come to the end of the period of validity of their visa and are eligible for no other visa to remain in Australia for a short period of time to pursue a claim;
- *Undocumented workers* who fear detection and immediate removal if they pursue a claim.

Q3. Protection against visa cancellation: Why not an expanded version of the Assurance Protocol between DHA and the FWO?

In principle, the Assurance Protocol was an innovative approach to migrant worker protection, acknowledging the need for visa safeguards to enable migrant workers to report exploitation. However, it has had virtually no impact. Between 2017 and 2021, it was used by only 77 temporary visa holders. This ineffectiveness stems from several shortcomings. Most of these are connected with the contingency that a worker only receives protection under the Assurance Protocol if the FWO pursues their case. These shortcomings include:

- ***FWO does not pursue most complaints.*** Because it is available only to workers who are 'helping [the FWO] with [its] inquiries', it is not available for exploited workers in relation to whom the FWO is not making further inquiries, due to lack of agency resources or any other reason. The FWO has limited resources and pursues a small number of inquiries from among the many Requests for Assistance that it receives. Community legal centre lawyers have found the FWO's determination of this threshold required to engage the Assurance Protocol to be inconsistent and unpredictable. As a result, availability of the Protocol is speculative and largely outside the worker's control.
- ***Many migrant workers won't approach FWO.*** There will always be a cohort of exploited migrant workers who are afraid of approaching government authorities, and these will likely

be among the most vulnerable to exploitation. If they do not approach the FWO, the Assurance Protocol provides no protection.

- ***FWO's remit does not extend to WHS and sexual harassment***. The Assurance Protocol is not available to workers who wish to approach any other government agency 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.
- ***Protocol unavailable for union or private legal action***. It is not available for a worker who seeks to remedy exploitation through collective action through a union or private legal action through the courts. This misses a significant opportunity to increase enforcement capacity through other actors alongside the FWO.
- ***Protocol is unreliable***. It is not enshrined in law or policy, rather it is set out on the FWO's and DHA's websites, drawing on a Memorandum of Understanding between the agencies that is not available to the public, lawyers or migration agents.

These shortcomings cannot be cured through stronger public promotion of the Protocol among temporary visa holders or expansion of its operation to different visa holders, including Working Holiday Makers. As a result, expansion of the Protocol is unlikely to result in significant change.

Q4. Why not introduce stronger employer sanctions under the Migration Act instead, such as those set out in the Migration Amendment (Protecting Migrant Workers) Bill 2021?

Introducing further employer offences will not reduce exploitation of migrant workers in Australia. Provisions in the *Migration Act* already criminalise a range of commonplace conduct by employers, including allowing an unlawful non-citizen to work (s 245AB) or a lawful non-citizen to work in breach of visa conditions (s 245AC) and asking for or receiving a benefit for a 'sponsorship-related event' (s 245AR). *These* ***existing offence provisions have been utilised very infrequently*** since their introduction to the Act.

Most exploitation is driven, primarily, by employers' confidence that regulators will not detect or punish labour noncompliance, including confidence that migrant workers will not complain about or take action to redress the exploitation. Introduction of new offences do not address either of these factors. Migrant workers will remain unwilling to report the commission of a new *Migration Act* offence for fear of jeopardising their visa or stay in Australia.

Q5. Aren't there other temporary visas that a migrant worker could use to enable them to pursue a claim?

There is ***currently no specific visa*** to allow workers to remain in Australia to pursue action against their employers. The closest comparable option is the Criminal Justice Stay visa, but that is limited to participation in criminal proceedings. There are no Bridging visas which are designed to enable workers to remain in Australia to pursue a civil claim. In any event, creation of a new Bridging visa would not be appropriate to enable workers to pursue legal action because Bridging visas carry work restrictions and preclude holders from applying for most other visas onshore. A Bridging visa with these restrictions would not provide exploited workers with the assurance to come forward and take action against their employers.

It would undermine the integrity of the migration program to suggest that they should apply for a student or other short-term visa to facilitate their stay for the purpose of pursuing a labour claim. They would not be found to have a genuine intention to study in Australia and should not be forced to apply for a visa in these circumstances, in the absence of any other visa to enable them to stay to address exploitation.

Q6. Do these provisions incentivise migrant workers to lodge bogus/fraudulent applications in order to obtain immigration benefits?

We understand there may be concerns that a visa applicant might 'manufacture' claims of exploitation in order to meet the requirements of a Workplace Justice visa, or might lodge an application for the visa without meeting the criteria in order to access an associated Bridging visa pending merits and judicial review.

In our view, these 'integrity'-related concerns are without foundation, for the following reasons:

- ***There are strong safeguards against fraudulent applications***.

  Eligibility for the Workplace Justice visa is conditional upon expert certification, in the form of a statutory declaration – exposing the declarant to penalties for perjury and disciplinary sanction as a legal professional. 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 or pro bono practice, none of whom have a financial or other incentive to falsely certify a claim. Certification can also be provided by an accredited expert employment lawyer, who is well-known in employment law community and would face great reputational risk, as well as professional sanction, for providing a false certification.

  We note that these integrity safeguards are significantly stronger than attach to other visa subclasses that are available to applicants who have previously had a visa refused or cancelled and do not hold a substantive visa. The Medical Treatment (Subclass 602) visa is an example of a visa that is open to all applicants in Australia – whether or not they hold a visa at the time of making the application, and whether or not they have previous had a visa refused or cancelled in Australia. Yet there are barely any threshold requirements at Schedule 1 to the Regulations relating to the lodgement of a valid visa application. In order to submit a valid visa application, applicants who have previously had a visa refused or cancelled are required only to provide a minimal, one-page 'evidence of the intended medical treatment.'[1]

  The eligibility requirements for a Workplace Justice visa, in particular the requirement for expert certification, are far more strenuous than the Subclass 602 requirements. The integrity of the Workplace Justice visa might be further safeguarded by introducing an initial *bona fides* assessment as a pre-requisite for the lodgement of a valid visa application, as follows.

[1] Subitem 1214A(3A) of Schedule 1 to the *Migration Regulations 1994* (Cth) (Migration Regulations) and legislative instrument IMMI 17/030.

- ***Eligibility for lengthy bridging visas can be avoided for many cases*.**

  It is possible to introduce an initial *bona fides* assessment of the claim as a requirement for lodging a valid application for a Workplace Justice visa. This would make the grant of an associated Bridging visa contingent on this bona fides assessment. The visa application validity requirements (at Schedule 1 to the Regulations) could include a requirement that a valid visa application is made only where an initial assessment is made by DHA of the bona fides of the claim. This would mean the lodgement of a valid visa application would not be possible, and a Bridging visa would not be granted, to those applicants whom DHA deems not to have a *bona fide* claim.

  We note that similar, initial *bona fides* assessments are included within several visa subclasses that are available to applicants who hold Bridging visas or are unlawful non-citizens. For instance, applicants who have previously been refused a visa and do not hold a substantive visa must supply two statutory declarations certifying the genuineness of their relationship, in order to validly apply for a Partner (Temporary)/Partner (Residence) visas onshore.[2] During the COVID-19 pandemic, in order to validly lodge an application for a Temporary Activity (Subclass 408) visa application on the basis of the 'COVID-19 pandemic event' with nil application charge,[3] applicants were required to demonstrate that they fell within specific classes of person – for instance, with evidence of working or having an offer of work in Australia.[4]

  Introduction of these additional application validity requirements would impose a relatively low regulatory burden upon DHA – for instance, assessment of the validity of a Partner (Subclass 820/801) visa application usually occurs within a single business day.

Q7. Given the widespread underpayment of migrant workers, will the availability of a new visa open the floodgates to thousands of exploited migrant workers with meritorious claims who are eager to extend their stay?

Although underpayment is widespread in many industries in which migrants work, there are natural limits on the number of migrant workers who would apply for the visa. These include:

- ***Breach must be non-trivial.*** Migrant workers will be required to demonstrate a meritorious claim for a *non-trivial* breach of labour law, for instance underpayment over a certain threshold such as $3,000. A less serious and easily remedied breach of labour law is not sufficient to ground an application for these protections.
- ***Evidentiary requirements are strict.*** The Workplace Justice visa is available to applicants pursuing a *legal claim* relating to breach of labour laws, rather than to migrant workers who have experienced exploitation at work. Breaches of labour laws can be difficult to detect and evidence, especially for migrant workers who are paid wages in cash and lack a written contract of employment. In addition, the difficulty in obtaining certification from a government agency or employment lawyer will necessarily limit the number of applications that are lodged.

[2] See subitem 1124B(3)(e)(ii),(iii) of Schedule 1 to the Regulations.
[3] See subitem 1237(2)(a)(i) of Schedule 1 to the Regulations and instrument LIN 22/046.
[4] Ibid, LIN 22/046 item 6(2).

- ***Period of extended stay is short***. Relative to the strict evidentiary requirements, the period of stay allowed by the Workplace Justice visa is short. We propose a short initial grant period, until the applicant can provide evidence of a proceeding against their employer. If such evidence cannot be produced, then the visa will come to an end after the initial grant period (of 3-6 months).
- ***Many international students and other migrant workers want to go home at the end of their stay.*** The reality is that only a portion of migrant workers would be interested in staying in Australia for a further short period. The difficulties inherent in pursuing legal claims for certain labour law breaches, and applying for the visa, will likely mean that some temporary visa holders will decide not to seek to remain in Australia to pursue a legal claim. We anticipate that the number of applications for the visa will represent a small fraction of the number of visa holders with potential claims against their employers.

If a large volume of applications are made for this visa, this would indicate that a correspondingly large number of proceedings have been commenced seeking enforcement of Australian laws against employers exploiting migrant workers. Proceedings at a sufficient scale would have the capacity to significantly change employer behaviour without increased resources to the FWO. We believe the regulatory benefit of this outcome would justify the resource burden on DHA decision-makers.

Uptake of the visa, even at somewhat lower levels, would have a substantial regulatory benefit, as discussed in Q1 above.

Q8. Given that workplace exploitation is so prevalent in jobs filled by temporary migrants in Australia, will these protections be available to too many visa holders and make visa conditions less meaningful?

Prior to the relaxation of Condition 8105, it was widely believed that large numbers of international students were working in breach of this condition. International students who were paid far below the minimum wage frequently worked increased hours to earn the equivalent income. Migration enforcement activities before COVID-19 were not minimising the frequency of non-compliance with the visa condition. In fact, an extremely small number of visas were cancelled on this basis. For many international students who needed to make up the additional income due to underpayment, fear of visa cancellation did not deter them breaching Condition 8105: it deterred them from reporting the exploitation.

The prevalence of workplace exploitation must be addressed, and is a clear commitment of this government. This may initially be in tension with increased enforcement of compliance with visa conditions. However, if migrant workers can safely address exploitation, over time exploitative jobs will become less readily available because employers will no longer be able to expect migrant workers to suffer in silence.

Q9. Do these provisions incentivise migrant workers to enter into exploitative employment in order to evade consequences for breach of their visa?

It is highly unlikely that migrant workers will decline a job that pays the correct minimum wage in favour of a job that underpays them in order to be able to breach their visa conditions. To be eligible for the proposed protections, they would need to be underpaid by a substantial amount over a substantial period of time, sufficient to meet the threshold of a non-trivial breach. In addition to this,

the migrant worker also needs to invest substantial time and effort in lodging and pursuing a labour claim. There would be very few migrant workers who would be better off under such an arrangement than if they were working in a job that paid their correct wages and entitlements (if such job were in fact available).

Q10. Will migrant workers on a Workplace Justice visa seek further exploitative jobs while on that visa in order to obtain a further visa?

Because of the requirement to demonstrate a non-trivial breach, it would be difficult for most Workplace Justice visa-holders to meet the eligibility requirements in the short time they are on the Workplace Justice visa. In addition, there are evidentiary and other practical barriers that will realistically prevent a large number of applications being made for the visa: the visa-holder will have no guarantee that their complaint or claim will be certified by a government agency or qualified expert for the purpose of a future visa application.

Nevertheless, it is possible to implement strong integrity measures to guard against the possibility of repeat Workplace Justice visa applications based on intentional orchestration of exploitation by successive employers. Departmental policy could require greater scrutiny of repeat applications. For example, policy could instruct delegates to request further evidence in respect of the claims giving rise to the application (such as a detailed letter from the certifying authority or an authorised lawyer) immediately after the application is lodged. Policy might also specify that repeat Workplace Justice visas are to be granted for a shorter period – for instance, 3 months – so that the applicant is put to evidence in respect of their claims every 3 months.

These integrity safeguards are substantially higher than exist in relation to common pathways available to visa holders to prolong their stay in Australia – for instance, by way of Medical Treatment visa applications.

Q11. Won't government agencies lose intelligence about exploitation and enforcement opportunities because protections will be available to workers who pursue cases through unions and private lawyers?

Both protections have an eligibility requirement that the migrant worker report the matter to FWO, DHA or another relevant government agency. As a result, incentivising workers to pursue labour claims through unions or a private lawyer will substantially *increase* intelligence gathered by government enforcement agencies.

Q12. Why should a new visa be introduced in the context of DHA's objective of visa simplification?

We support the government's intention to simplify the visa system, including reducing the number of visa categories. The proposed Workplace Justice visa is not inconsistent with this goal. The visa is necessary to address workplace exploitation and there is no similar or related visa among current visa options that could serve its purpose of short term stay to pursue a meritorious labour claim. Declining establishment of this visa in order to reduce the number of visas would place form over critical regulatory function.

Q13. Can't migrant workers just pursue a claim when they are back in their home country instead of staying in Australia?

The FWO has only ever done this in a small number of matters.[5] This is also true of unions and Community Legal Centres. This is because it is extremely difficult to pursue a claim from abroad, for the migrant and for lawyers and government agencies in Australia. It is difficult and highly resource-intensive to obtain evidence, sworn statements and video testimony, in addition to the ongoing provision of instructions. The overwhelming majority of migrant workers (and service providers) are unable to do this, unless the government makes a very significant investment in new court and mediation processes and support services for migrant workers in their home countries and in Australia.

Of course, if a migrant wishes to return home and pursue a claim after leaving Australia, these protections present no obstacle.

Q14. Would the availability of the Workplace Justice visa encourage migrant workers to wait until the end of their stay to bring a claim rather than reporting exploitation when it occurs?

The overwhelming majority of migrant workers do not report exploitation when it occurs. In our survey of 4,332 migrant workers, only 9% of workers who were aware they were underpaid spoke to anyone or took any action to recover their wages. The reasons for this are well documented. The benefit of the Workplace Justice visa is to encourage the 91% of migrant workers who remained silent to report exploitation and bring a claim. Though it is conceivable that some portion of the 9% would prefer to wait until the end of their stay to bring a claim, this number is so small as to be unlikely to impact the intelligence FWO obtains (especially given that FWO only takes up a small number of the cases reported to it).

[5] In correspondence with the FWO, the agency pointed to 5 matters commenced against employers while workers were in Australia and were continued after workers left Australia: Email to Laurie Berg from Louise Peters, Executive Director – Engagement, Offices of the Fair Work Ombudsman, 21 November 2022.