Ai GROUP SUBMISSION

Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Protecting Migrant Workers) Bill 2021

28 January 2022

Introduction

Ai Group welcomes the opportunity to provide a submission to the inquiry by the Senate Legal and Constitutional Affairs Legislation Committee into the provisions of the *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**Bill**).

Ai Group does not support the small number of employers who deliberately fail to comply with workplace and migration laws. These laws are important in providing an appropriate safety net of protection for migrant workers, particularly those who are vulnerable in the community.

We acknowledge the Bill's broad purpose to strengthen migration laws to reduce the opportunity for unscrupulous exploitation of migrant workers. To this end it is important the Bill appropriately targets exploitation of migrant workers rather than unintentional non-compliance with relevant laws. Australia's workplace relations system is very complex and comprises a variety of different sources of minimum employment conditions including 121 modern industry and occupational awards, the National Employment Standards and other provisions in the *Fair Work Act 2009* (**FW Act**), enterprise agreements, State long service leave laws, and many other laws, regulations and industrial instruments. Workplace laws, regulations and industrial instruments are often the subject of contested interpretations and ambiguity.

The Bill relies on the current definition of *non-citizen* in the *Migration Act 1958* (Cth) (**Migration Act**) for the framing of new offences and civil remedy provisions. This definition includes a far broader class of worker than the workers focused on in the Migrant Workers Taskforce Report[1] where it was stated:

> "Our attention has mainly been on the employment experience of temporary migrants who have work rights under international student and working holiday maker (backpacker) visas since in large part these appeared to be the areas where problem was greatest."

Given the Bill's reliance on the expansive definition of *non-citizen* and its inclusion of many high-income professionals with related professional qualifications, it is important that offences and penalties are not solely framed on presumptions of vulnerability about non-citizens.

Ai Group has identified a number of problems with the proposed Bill that are detailed in this submission. In summary these problems include:

- The new offence at section 245AAB relating to the use of migration rules appears to capture employers who may insist on particular work arrangements to satisfy migration rules. We do not think this is appropriate or what was intended in this provision.

- Ensuring that the Prohibited Employer provisions are appropriately targeted at specified FW Act contraventions relating only to non-citizens.

[1] Final Report of the Migrant Workers' Taskforce, published on 7 March 2019, Chair's Overview, p.5.

- Ensuring that the Prohibited Employer provisions are not based on contravention orders that may be the subject of an appeal.

- Ensuring that the Prohibited Employer provisions do not prevent employers from engaging non-citizen contractors employed by other businesses.

These provisions should be amended as outlined below.

Ai Group welcomes the use of the Compliance Notices and Enforceable Undertakings as effective measures of intervention and enforcement that may obviate the need for prosecution. Similar tools of enforcement are contained in the FW Act and it is important that these measures are available to the relevant regulator to achieve compliance.

The Bill's new offences

The Bill introduces two new offences at sections 245AA and 245AAB relating to a person coercing a non-citizen to breach work-related visa conditions and coercing a non-citizen by using migration laws.

These proposed offences attract maximum penalties of 2 years imprisonment and/or 360 penalty units. The offences may also be prosecuted as civil remedy contraventions attracting a maximum penalty of 240 penalty units.

We note that similar existing offences in the Migration Act contain equivalent terms of imprisonment and similar fault elements. However, unlike existing work-related offences in the Migration Act, the two new offences do not align with the Act's established defences for when an employer can demonstrate it took reasonable steps to prevent the contravention. This departure from the established defence framework results in two new offences that are extremely broad and potentially disproportionate to the range of conduct that could be construed as an offence under the Bill's provisions.

The two offences introduce into the Migration Act undefined concepts of undue influence, undue pressure and coercion in respect of the offending conduct.

The Bill's Explanatory Memorandum at paragraph [29] states that the 'general law' in respect of undue influence, undue pressure and coercion is to apply, but states that such concepts are not limited to illegitimate or improper conduct but may capture conduct that involves excessive pressure.

Ai Group is concerned about the broad application of these undefined concepts and the lack of adequate certainty as to the types of conduct and issues to which the conduct relates for the purpose of criminality. These offences contain criminal penalties of up to 2 years imprisonment and 360 penalty units and therefore it is important that further clarity is provided to better focus deterrence and to ensure that conduct amounting to an offence is commensurate with the criminal penalties imposed.

The drafting of the offence at section 245AAB lacks the necessary qualification regarding the compliance of the work arrangement with a work-related visa requirement. The Explanatory Memorandum refers to this offence arising in circumstances where the employee is unable to satisfy work-related visa requirements. As currently drafted the offence appears to be based on the application of coercion (or undue pressure or undue influence) rather than a non-compliant outcome.

For example, in relation to section 245AAB, it could be that an employer who offers a particular working arrangement which complies with workplace laws but does not give the employee a choice about working arrangements, commits an offence.

There have been arguments before the Fair Work Commission that employers who seek to terminate the employment of an employee because the employee is unwilling to comply with a relevant policy, have engaged in economic and social coercion or economic duress. The very recent Recommendation of the Fair Work Commission in *Construction, Forestry, Maritime, Mining and Energy Union and others v BHP Coal Pty Ltd T/A BHP Billiton Mitsubishi Alliance / BMA and others - Re BMA Caval Ridge Mine Enterprise Agreement 2018* - [2022] FWC 81 was one such case. The CFMMEU argued that the employer's insistence that employees comply with the employer's requirement to provide evidence of COVID-19 vaccination status was economic and social coercion. While the Commission ultimately found that the employer's requirement to comply with its vaccination and disclosure policy was not coercion, it raises issues about the broad concept of coercion where an employee's employment may be believed to be under threat.

The similarly undefined term "*arrangement in relation to work"* in section 245AAB is capable of broadly applying to many lawful terms and conditions of employment. If the new offences are to be framed around broad general law concepts of undue influence, undue pressure and coercion, it is essential that the offences contain some moderating parameters to ensure that lawful conduct is not criminalised, and the offence appropriately targets the types of conduct the legislation is seeking to criminalise.

Combined with the Act's existing defence framework for work-related offences, we urge the Committee to recommend the following amendments to section 245AAA in the Bill:

245AAA Coercing etc. a non-citizen to breach work-related conditions

(1) A person (the first person) contravenes this subsection if:

(a) the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work; and

(b) that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else; and

(c) either:

(i) as a result of the arrangement, the non-citizen breaches a work-related

condition; or

(ii) there are reasonable grounds to believe that, if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related condition.

(2) Subsection (1) does not apply:

(a) if the first person's conduct in relation to the non-citizen is authorised by law, including an industrial instrument; and

(b) where the employer took reasonable steps to verify that the worker would not be in breach of the work-related condition.

In addition, we seek an amendment to section 245AAB by adding a new subsection (2) and renumbering subsequent subsections, as follows:

245AAB Coercing etc. a non-citizen by using migration rules

(1) A person (the first person) contravenes this subsection if:

(a) the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work; and

(b) that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else; and

(c) the non-citizen believes, or there are reasonable grounds to believe, that the non-citizen must accept or agree to the arrangement:

(i) to satisfy a work-related visa requirement; or

(ii) to avoid an adverse effect on the non-citizen's immigration status under Division 1.

(2) Subsection (1) does not apply if the first person's conduct in relation to the non-citizen is authorised by law, including an industrial instrument.

Prohibited Employers

The Bill introduces new powers for the Minister to prohibit certain employers from employing additional non-citizens.

Specifically, sections 245AYC and 245AYD enable the Minister to declare certain employers prohibited from employing additional non-citizens, either as employees or as persons entering a contract for services. The prohibition is for a specified period determined by the relevant declaration.

The names of prohibited employers may be published with such exposure designed as a further deterrent. An employer would have 28 days in which to show cause why the declaration should not be issued by the Minister. A decision to issue a declaration may be challenged in the Administrative Appeals Tribunal.

Employers who may be declared Prohibited Employers by a declaration from the Minister include where an employer:

- is an approved work sponsor subject to a ban by the Minister; or
- is convicted of a work-related offence or subject to a civil penalty order in relation to a work-related contravention; or
- is subject to an order for a contravention of certain civil remedy provisions under the FW Act *and* the contravention is in relation to a non-citizen.

Section 254AYD(4)(d), in referencing contraventions of the FW Act, should be amended.

Firstly, the FW Act itself does not distinguish contraventions of civil remedy provisions between non-citizens and citizens. It is conceivable that employers who are subject to an order for contravention may be subject to an order that relates overwhelmingly to employees who are citizens and only one who is a non-citizen. This is made possible by section 557 of the FW Act which permits two or more contraventions to be taken as one contravention if the contraventions are committed by the same person and the contraventions arose out of a course of conduct by the employer.

It would be inappropriate for employers to be faced with the additional sanction of prohibition for one class of employee affected by the same contravention applying to others. We note too that the targeted focus of these contraventions was squarely at temporary migrant workers as identified by the Migrant Worker Taskforce Report at Recommendation 20 and not at workers generally.

Secondly, an employer subject to an order for contravention may be considering its right to appeal the relevant decision or may have filed an appeal. This includes cases of public interest where the decision giving rise to the contravention raises issues of public importance for other employers and employees. It would be inappropriate for employers to be faced with a prohibition declaration when the decision giving rise to a contravention may be the subject of an appeal.

Ai Group recommends that the following amendments are made to section 254AYD(4)(d):

(d) both:

(i) the person is the subject of an order made under the Fair Work Act 2009 for contravention of a civil remedy provision (within the meaning of that Act) covered by subsection of this section *and where the person has had the opportunity to exercise any appeal rights and the appeal or appeals have been determined*; and

(ii) the contravention is *only* in relation to an employee who is a non-citizen.

A similar amendment is required in section 254AYA (2)(d) – Overview.

Ai Group is also concerned at the range and level of FW Act contraventions identified in section 254AYE as being capable of making employers vulnerable to a prohibition. Many FW Act contraventions by employers are not intentional and result from payroll errors or errors of interpretation. In many cases, workplace law interpretations are unresolved or are tested by employers or unions.

There have been a number of recent High Court cases concerning FW Act interpretations dealing with, for example, casual employment and the correct calculation of personal/carer's leave. Disputed interpretation that are pursued through the Courts typically involve the making of orders.

The range of contraventions in section 254AYE should be limited to those contraventions that meet the definition of a 'serious contravention' in section 557A of the FW Act. A 'serious contravention' is generally where the person knowingly contravened the provision and the person's conduct constituting the contravention was part of a systematic patterns of conduct relating to one or more other persons.

Further, the Bill's prohibited employer provisions at section 254AYC draws on the Migration Act's existing definition of ***work*** and ***allows*** (currently section 245 AG) in respect of the effect of the prohibition on an employer. Ai Group opposes the use of this definition in this context on the basis that it is unworkable and would lead to unfairness for businesses. Ai Group has significant concerns about the application of this expansive definition of ***work*** **and** ***allows*** to include:

- the engagement of a person under a contract for services (other than for domestic purposes);
- the person participates in an arrangement, or any arrangement included in a series of arrangements, for the performance of work by the non-citizen for: (i) the person; or (ii) another participant in the arrangement or any such arrangement...

Businesses frequently engage an array of contractors (e.g. for repair and maintenance work, management consultancies, marketing projects and IT services) in a wide range of circumstances that are likely to be unrelated to the contravention giving rise to the prohibition.

While we presume that the expanded prohibition to include independent contractors is to limit the opportunity for avoiding the effect of the prohibition, (e.g. for roles that may be more suited to employment) our concern is that businesses are placed in the position of having to determine whether each contractor engaged with is in fact a non-citizen or is supplying non-citizen workers, to comply with declaration.

Engaging other businesses to perform specialised unplanned or emergency repair work or (including for work health and safety reasons) should not be constrained in this way. The definition in the context of the prohibition is an over-reach and could have substantial adverse consequences for the operations of businesses.

The definition also potentially covers employers who may inadvertently engage non-citizens where those non-citizens are employed by somebody else, (such as a labour hire arrangement or other contracting entity), and whether that is included as a 'contract for services.' This outcome in our view exceeds what was contemplated by the relevant recommendation in the Migrant Workers Taskforce Report. The incidental and unintentional engagement of a non-citizen by merely participating in a commercial arrangement with another business should not be subject to the prohibition.

Further, Ai Group is concerned about the Bill's retrospective application to FW Act contraventions (over seemingly an unlimited period of time), for the purpose of, and reasons for, a decision by the Minister as to whether to declare the employer a prohibited employer. Many employers in recent years have invested heavily in legal advice and governance systems to ensure that the varied and many terms and conditions in modern awards, enterprise agreements and workplace laws are complied with. In most circumstances, it would be unjust for a past contravention order to result in the employer being declared a Prohibited Employer where the employer has taken the necessary remedial actions to avoid subsequent breaches.

New provisions reinforcing the requirement to use VEVO

Ai Group notes that these provisions are aimed at ensuring that VEVO is the computer system utilised to identify whether a person can lawfully work. It is important that the Bill's provisions enable a level of flexibility in respect of who may undertake these VEVO checks.

Aligning and increasing penalties

Ai Group notes the Bill's increase in civil pecuniary penalties. To this end civil prosecution with higher penalties is more appropriate for remedial outcomes than punitive criminal proceedings.

Compliance Notices and Enforceable Undertakings

Ai Group welcomes the Bill's provisions relating to compliance notices and enforceable undertakings as enforcement tools aimed at achieving remedial compliance without punitive litigation.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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