Queensland Law Society

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Office of the President

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Confidential

Our ref: LP-MC

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email: [redacted]

Dear Mr Tidball

Migration Amendment (Protecting Migrant Workers) Bill 2021

Thank you for the opportunity to provide comments for inclusion in the Law Council's submission on the Migration Amendment (Protecting Migrant Workers) Bill 2021.

As stated in our submission in response to the exposure draft of this legislation, the Queensland Law Society (**QLS**) has repeatedly advocated for better support for workers who have not been paid their correct entitlements or who have been exploited by their employer. We have submitted that the most effective way to provide this support is by way of appropriate resources to improve the effectiveness of laws and processes that already exist; for example, making it easier and more cost effective for someone to pursue a claim for unpaid wages in the Federal Circuit Court and funding for the legal assistance sector, including culturally and linguistically diverse services, so that workers can be educated and empowered to pursue these rights.

We provide the following, brief submission, for your consideration which addresses some of the issues raised in your memorandum and attachment.

New coercion offences and civil penalties

QLS agrees with the Law Council's comments in the submission responding to the exposure draft of this legislation about the need for increased enforcement of existing offence provisions and better access to remedies for workers, including increased resources for the courts and commissions, Fair Work Ombudsman and legal assistance sector.

We also agree with your comments about the scope of these new offence at pages 14 and 15 of the submission. This was an issue we raised in our earlier submission. We do not consider this issue has been sufficiently clarified in the Explanatory Memorandum. The Explanatory Memorandum should be amended to make clear who is covered by the offences in proposed

sections 245AAA and 245AAB; that is, whether the Government intends for the offence to apply to employers and/or persons connected with employers *and* any other person such as a family member or acquaintance of the worker. We note the example scenarios provided for in the Explanatory Memorandum all refer to employers.

We otherwise note your comments in the attachment to your memorandum that the drafting issues identified in your previous submission have been addressed.

Prohibited employer scheme

In our previous submission, we raised concerns about the potential impact of this scheme on business and particularly, migrant and vulnerable workers. The amended provisions in this Part, outlined in the Law Council's attachment, heighten these concerns.

Proposed section 245AYA(2) in Item 9 of the Bill provides that a person who is *or was*:

- an approved work sponsor subject to a bar imposed by the Minister;
- the subject of a civil penalty order in relation to contravention of a work-related provision;
- the subject of an order for certain contraventions of civil remedy provisions under the *Fair Work Act 2009* (**FWA**) in relation to the employment of a non-citizen

can be declared a prohibited employer by the minister. The declaration must be made within five years of the sanction being imposed (proposed section 245AYG(2)). A *migrant worker sanction* can be one of 18 civil penalty provisions under the FWA as set proposed section 245AYE.

While the issuing of such a declaration is not an automatic process, allowing the Minister to base their decision on such a wide range of provisions in the FWA and for a period dating back as far as five years from the date the sanction was imposed (not the conduct that gave rise to the sanction), may lead to unintended consequences for employers who have remedied their non-compliance with the FWA as well as for workers and prospective workers who will be unable to work for that employer during the period of prohibition.

Additionally, item 11 of the Bill provides that the relevant migrant worker sanction can relate to conduct that occurred before the commencement of these provisions. We are generally concerned about penalties, which we consider a prohibition for an employer is, being imposed retrospectively or in respect of conduct that occurred before the penalty was in effect. The intent of these provisions is to protect current and future workers – in our view, past workers or workers who have already been exploited should instead be assisted to recover their entitlements. Past employer conduct may not be indicative of current conduct and imposing a further penalty on an employer in respect of conduct that pre-dates these provisions may lead to the adverse outcomes we have discussed in this response and in our previous submission.

While we support reasonable laws to ensure that workers are not placed in situations where they are exploited, particularly if they are vulnerable, we query whether the right balance has been struck in these provisions.

Period of declaration and procedure to revoke

We agree with the comments made in your submission that there should be a prescribed period of time in the legislation that a declaration is effective for or, at least, some guidance for the Minister about what an appropriate period of time should be.

Currently, proposed section 245AYG(9) simply says that a declaration has effect during the period specified in the declaration unless sooner revoked.

Apart from being able to apply to the Administrative Appeals Tribunal for a review of the Minister's decision to make the declaration, there is no other process set out about how a person can apply to end or revoke a declaration. It may also assist the AAT in reviewing a decision about a timeframe if there was some legislative guidance on this issue.

We recommend that a period of time that a declaration is effective, or criteria by which such period is determined, should be included in this new Subdivision. It is our preference that these particulars are contained in the primary legislation, however, if they are to be included in the regulation, then the draft should be released for consultation.

Further, we also recommend that a process for seeking to revoke a declaration be included in the legislation.

Verifying immigration status through a computer system

We note many of the provisions in Part 3 of the Bill haven been amended following consultation on the exposure draft. These amendments include the addition of subparagraph (c) into proposed amended sections:

- 245AB(2);
- 245AB(2);
- 245AE(2); and
- 245AEA(2).

This subparagraph provides that a person does not breach these provisions if they do "any one or more things prescribed by the regulations. While these changes may address the concerns raised in our previous submission, we do not know what "things" will be listed in the regulations and therefore whether they will be able to be reasonably complied with by employers.

The draft regulation should be released for public consultation before it is made to ensure that the drafting adequately addresses our concerns about compliance.

<u>New regulations</u>

We refer to our previous comments about access to identity documents for persons without an Australian birth certificate or Australian passport (including Aboriginal and Torres Strait Islander People with unregistered births). The new regulations for the provisions in Part 3 of the Bill should provide for a way an employer can comply with the legislation in circumstances where the prospective worker does not have these relevant identity documents.

Our previous submissions provides further details on measures the Government could take to assist both employers and prospective workers to be compliant.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Kara Thomson
President