

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Strengthening Reporting Protections) Regulations 2024

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Subsection 504(2) of the Migration Act provides that section 14 of the *Legislation Act 2003* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the commencement of the regulations.

The *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Strengthening Employer Compliance Act) received Royal Assent on 20 February 2024 and commences on 1 July 2024. The Strengthening Employer Compliance Act introduces a range of measures, including the repeal of current subsection 116(1A) of the Migration Act and implementation of new subsections 116(1A) and (1B).

New subsection 116(1A) of the Migration Act provides that the *Migration Regulations 1994* (the Migration Regulations) may prescribe matters that the Minister must, must not or may take into account when determining whether to cancel a person's visa.

Subsection 116(2) of the Migration Act provides that the Minister is not to cancel a person's visa under subsection 116(1), (1AA), (1AB) or (1AC) if there exist circumstances prescribed in the Migration Regulations.

The *Migration Amendment (Strengthening Reporting Protections) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to prescribe:

- circumstances in which the visa of a temporary migrant worker who has been affected by a workplace exploitation matter must not be cancelled (***non-discretionary protection***); and
- where the non-discretionary circumstances do not apply – matters that the Minister must have regard to when determining whether to cancel the visa of a temporary migration worker (***discretionary protection***).

The Amendment Regulations strengthen the protections available to migrant workers to given them confidence to report workplace exploitation matters. They form a critical part of a package of reforms to address migrant worker exploitation which the Government committed to bring forward at the Jobs and Skills Summit 2022.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments. The OIA considers that the Amendment Regulations are unlikely to have more than a minor regulatory impact and therefore no impact analysis is required. The OIA consultation reference number is OIA24-07058.

Section 17 of the *Legislation Act 2003* (Legislation Act) provides that the rule maker must be satisfied that consultation has been undertaken that is appropriate and reasonably practicable before making a legislative instrument.

The Department has conducted extensive consultation with expert practitioners experienced in supporting temporary migrants with workplace matters to inform these reforms. Feedback from this engagement emphasised the need to legislate current protections, which have largely existed in policy since 2017 following the establishment of the Migrant Workers' Taskforce. The aim is to provide greater transparency and certainty to temporary migrants wanting to report workplace exploitation matters. Practitioners also advised that the protections would have greater impact if key non-government entities could support requests for protection where that non-government entity is providing expert legal advice on the workplace exploitation matter, noting not all workers seek support through the Fair Work Ombudsman (FWO). The Department of Employment and Workplace Relations and the FWO have also participated in co-designing the initiatives.

The Amendment Regulations effectively uplift into legislation the existing policy-based protections (i.e. the policy known as the Assurance Protocol) and enable accredited non-government entities to be involved in the process. The Amendment Regulations uphold the primary purpose of Australia's visa programs through the ongoing strong emphasis on the need to comply with the conditions and purpose of those visa programs.

The initiative is being implemented as a pilot to test the proposal's ability to provide confidence to temporary migrants to seek support for workplace exploitation matters in a timely manner. As a pilot, there will be ongoing monitoring, including through stakeholder engagement with pilot participants, to inform any necessary adjustments. An evaluation of the pilot will be undertaken to consider the effectiveness of the measure and inform any necessary adjustments.

The Amendment Regulations commence on 1 July 2024.

Details of the Regulations are set out in [Attachment B](#).

The Amendment Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other*

Matters) Regulation 2015. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act

The Migration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Strengthening Reporting Protections) Regulations 2024

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Strengthening Employer Compliance Act) amends the *Migration Act 1958* (Migration Act) with effect from 1 July 2024. The Strengthening Employer Compliance Act introduces a range of measures to help address migrant worker exploitation, including the repeal of current subsection 116(1A) of the Migration Act and implementation of a new subsection 116(1A) and (1B).

New subsection 116(1A) of the Migration Act, as inserted by the Strengthening Employer Compliance Act, provides that the *Migration Regulations 1994* (the Migration Regulations), may prescribe matters that the Minister must, must not or may take into account when considering whether to cancel a person's visa under a discretionary power to cancel a visa in section 116 of the Migration Act.

Subsection 116(2) of the Migration Act provides that the Minister is not to cancel a person's visa under subsection 116(1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in the Migration Regulations in which a visa is not to be cancelled.

The *Migration Amendment (Strengthening Reporting Protections) Regulations 2024* (the Amendment Regulations) amend the Migration Regulations to prescribe:

- circumstances in which the Minister must not cancel the visa of a temporary migrant worker who has been subjected to workplace exploitation (***non-discretionary protection***); and
- where the non-discretionary circumstances do not apply – matters that the Minister must consider when considering whether to exercise the discretion to cancel the visa of a temporary migrant worker (***discretionary protection***).

The 'Strengthening Reporting Protections' measure is one of a range of measures the Government is introducing to address migrant worker exploitation in response to a commitment made at the *Jobs and Skills Summit*. This commitment was made in response to serious concerns about the corrosive impact of migrant worker exploitation, recognising the harm caused to the migrant worker and their family. The commitment also recognised broader concerns that if left unaddressed, migrant worker exploitation has the potential to put downward pressure on wages and conditions for all workers and it creates an un-level playing field for those businesses who do the right thing.

The package of reforms is informed by the findings of the *Migrant Workers' Taskforce* report, the *Nixon Review* and the *Migration Strategy*. One of the overarching objectives of these

measures is to address migration-related barriers that have been identified as deterring temporary migrant workers from reporting exploitation due to fears of adverse repercussions on their visa status.

In 2017, consistent with the findings of the *Migrant Workers' Taskforce*, the Government sought to address, through the implementation of an arrangement known as 'the Assurance Protocol', fears that a temporary migrant would risk having their visa cancelled if they reported exploitation. The Assurance Protocol was a policy-based arrangement between the Fair Work Ombudsman (FWO) and the Department of Home Affairs (Home Affairs), in which 'assurance' was provided to the temporary visa holder that Home Affairs would not cancel a person's visa, for breach of a work-related visa condition, if the visa holder was assisting the FWO with its inquiries, provided there were no other grounds for cancellation and the visa holder committed to complying with their visa conditions in the future. Any referral from the FWO to Home Affairs also required the consent of the temporary migrant worker. The overarching aim was to enable temporary migrants to report and resolve issues of exploitation in a timely manner. Between 2017 and 2024, less than 100 people engaged with this arrangement. No referral to Home Affairs under the Assurance Protocol has resulted in visa cancellation (i.e. the 'assurance' has been honoured).

Despite the fact that no person's visa has been cancelled under the Assurance Protocol arrangement, expert practitioners experienced in supporting temporary migrants with workplace matters have advised that there is a lack of trust in the policy-based Assurance Protocol and have recommended for protections from visa cancellation to be legislated. They also advised that the protections would have greater impact if key non-government entities could support requests for protection where that non-government entity is providing expert legal advice on the workplace exploitation matter, noting not all workers seek support through the FWO.

The amendments made by the Amendment Regulations address these concerns by legislating discretionary and non-discretionary protections against visa cancellation. These amendments provide greater clarity and certainty to temporary migrants about the scope of the protections against visa cancellation. The amendments also enable a participating government entity or accredited non-government party, to certify workplace exploitation matters to assist temporary migrant workers requesting the protection. This will help to ensure claims relating to a workplace exploitation matter are genuine.

This expanded protection will be tested in a two-year pilot, which will be subject to ongoing monitoring, and an evaluation of the effectiveness of the reforms. The Government will review the outcomes of these reforms and consider any recommendations that may arise from that review. The aim is to achieve the overarching objectives of addressing the exploitation of temporary migrant workers and supporting the effectiveness of Australia's migration programs, including by reinforcing the importance of complying with visa conditions and meeting the genuine purpose of the visa.

The amendments implement a non-discretionary protection from visa cancellation, that is, they prescribe the circumstances in which the visa of a temporary migrant worker who has been the subject of a workplace exploitation matter must not be cancelled. This non-discretionary protection applies to visa holders who have permission to work (i.e. those without a 'no work' condition on their visa) where the grounds for cancellation relate to the breach of a work-related visa condition. An example of a work-related visa condition is the condition relating to the maximum number of hours the visa holder can work, which is imposed on student visas to ensure students are able to devote sufficient time to their studies (the primary purpose of their visa). The reason for focusing on breach of work-related conditions is because the measure

seeks to specifically address circumstances relating to work. The protection requires the visa holder to commit - in writing - to complying with their visa conditions in the future. It also requires the Minister (or their delegate) to be satisfied that the visa holder will comply with the purpose of their visa.

Importantly, the protection also requires the Minister (or their delegate) to be satisfied that there is a connection between the circumstances of the breach and the workplace exploitation matter. For example, the underpayment of wages leading to a temporary migrant working more hours than they are permitted to work; or an employer's knowledge of a breach of visa condition being used to pressure the temporary migrant into accepting exploitative pay or conditions.

The purpose for providing a non-discretionary protection from visa cancellation in these specific circumstances is to give the worker greater clarity and certainty about the protection against visa cancellation, thereby increasing trust in the protection. In turn this trust is expected to increase confidence in reporting worker exploitation concerns to relevant authorities, bolster the pursuit of redress and support appropriate employer compliance and enforcement action to reduce any further instances of exploitation. Providing a non-discretionary protection for visa holders with permission to work on their visa supports the integrity of the visa program by aiding to uphold Australian workplace law. The aim is to ensure migration rules don't undermine those laws by enabling dishonest employers to misuse those rules to exploit temporary migrant workers.

The amendments also implement a discretionary protection from visa cancellation by prescribing matters to which the Minister (or their delegate) must have regard when considering whether to cancel certain temporary visas for breach of a condition. This protection is available in a broader range of circumstances than the non-discretionary protection, including for those visa holders who have already accessed the non-discretionary protection, and for the breach of other (non-work related) conditions. It is applied depending on the individual circumstances of the case.

While the amendments ensure that a decision-maker considers the prescribed matters, which mostly relate to the connection between a worker exploitation matter and the breach of a visa condition, decision-makers will continue to consider other more general matters relevant to visa cancellations as set out in policy guidance, including, for example, taking the best interests of the child, where relevant, into account as a primary consideration.

A legislative instrument will be made under the amended regulations to identify third parties accredited to certify workplace exploitation matters to support requests for the protections.

The protection against visa cancellation under both these new provisions (non-discretionary and discretionary) does not preclude a visa holder's visa being cancelled under another power, such as those relating to fraud, character or national security.

Human rights implications

These amendments engage the following rights:

- Right to just and favourable conditions of work – Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- Rights to equality and non-discrimination – Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2(2) of the ICESCR

- Right to privacy – Article 17(1) of the ICCPR

Rights relating to just and favourable conditions of work

Article 7 of the ICESCR, states that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work [...]

(b) Safe and healthy working conditions; [...]

The protections against visa cancellation further promote rights to just and favourable conditions of work.

The protections against visa cancellation seek to address migration related barriers that deter temporary migrants from reporting workplace exploitation and seeking a remedy in a timely manner. Practitioners working with temporary migrants have advised that temporary migrants choose not to report exploitation, or support an investigation, for fear of visa cancellation and jeopardising their migration journey.

The amendments seek to provide assurance to temporary migrant workers that reporting exploitation and seeking workplace justice will not result in visa cancellation in prescribed circumstances. The amendments seek to achieve the objectives of the work related visa conditions in supporting the intent of the various visa programs as well as the goal of ensuring employers are not able to misuse those visa rules to exploit and silence temporary migrant workers. In doing so, the amendments enable workers to confidently initiate claims to remedy breaches of workplace laws, or to assist in investigations of employer breaches, leading to improved workplace justice outcomes for all workers (including temporary migrants).

Recognising the power imbalance between temporary migrant workers and employers, this measure endeavours to empower the temporary visa holder to report their exploitation early and seek redress in a timely manner when their rights to just and favourable conditions of work have been infringed, with greater assurance that their visa will not be cancelled. Addressing this issue may also further a broader objective of upholding just and favourable conditions of work, including effective regulation of pay and conditions, for all workers, by preventing the use of migrant worker exploitation to undercut Australian laws.

Right of equality and non-discrimination

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

Similarly, in its General Comment on Article 2 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

As an underlying principle, workers should be protected by workplace laws regardless of their immigration status. The Workplace Justice Visa supports this principle and promotes the rights to equality and non-discrimination, ensuring visa holders are not unduly disadvantaged because of their temporary visa status, specifically in relation to their exercise of work-related rights.

The parameters of the measure impose some limitations on the access to the protections against visa cancellation by visa holders only where it is justified in meeting the broader objectives of the immigration program. Visa holders who have a ‘no work’ condition on their visa or who hold a bridging visa will have access to the discretionary visa cancellation protection (as opposed to the non-discretionary protection available to substantive visa holders with the right to work on their visa). This is a necessary safeguard to enable the careful management of non-work related visa programs. All temporary migrants remain legally entitled to report worker exploitation and seek support regardless of their immigration status. Where the workplace exploitation matter has been certified, and the person seeks protection from visa cancellation in accordance with these amendments, individual circumstances will be assessed on a case-by-case basis, taking into account the discretionary protection matters prescribed.

Rights relating to privacy

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Pursuant to Article 17(1) of the ICCPR, any interference with an individual's privacy must have a lawful basis. In addition to requiring a lawful basis for limitation on the right to privacy, Article 17 prohibits arbitrary interference with privacy. Interference which is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances.

Information provided to Home Affairs by the visa holder when requesting the protection against visa cancellation will be collected, used or disclosed with the visa holder's written consent and in accordance with the *Privacy Act 1988*. This may include using or disclosing personal information for activities conducted by, or on behalf of, an enforcement body, as required by law. Information received about employers engaged in workplace exploitation matters will be referred for possible compliance and enforcement action. Through this referral, government regulators will be able to better target dishonest employers to enhance employer compliance and uphold workplace laws for the benefit of all workers in the Australian labour market.

Such disclosures would therefore be in accordance with, and subject to the safeguards in, the applicable laws which authorise the disclosure and support the objectives of those laws.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights as it protects the human rights of vulnerable migrant workers in Australia and, to the extent that aspects of the measures may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of upholding the integrity of Australia's migration programs and addressing migrant worker exploitation in a holistic way.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

Details of the Migration Amendment (Strengthening Reporting Protections) Regulations 2024

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Strengthening Reporting Protections) Regulations 2024*.

Section 2 – Commencement

This section provides that the Regulations commence on 1 July 2024.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958* (Migration Act).

Section 4 – Schedules

This section provides for the operation of the Regulations. The effect is that Schedule 1 amends the *Migration Regulations 1994* (Migration Regulations) as set out in the Schedule.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Regulation 1.03

1. This item inserts the followings definitions in regulation 1.03 of the Migration Regulations:
 - a. *certifying entity*
 - b. *government entity*
 - c. *workplace exploitation matter*.
2. The definitions of *certifying entity* and *workplace exploitation matter* are provided in new subregulations 1.15R(1) and 1.15R(2) respectively.
3. The term *government entity* is defined in regulation 1.03 of the Migration Regulations to mean an agency or authority of the Commonwealth, a State or a Territory, or a person who holds an office or appointment under a law of the Commonwealth, a State or a Territory. This could include, for example, a government department or a government entity responsible for investigating matters of alleged workplace exploitation.

Item [2] – At the end of Division 1.2 of Part 1

4. This item inserts new regulation 1.15R at the end of Division 1.2 of Part 1 of the Migration Regulations.

5. New regulation 1.15R of the Migration Regulations provides the definitions of *certifying entity* and *workplace exploitation matter*.
6. New subregulation 1.15R(1) of the Migration Regulations provides that the Minister may by legislative instrument determine that a person, body or government entity is a *certifying entity* for the purpose of proposed regulations 2.43A and 2.43B of the Migration Regulations.
7. A non-government *certifying entity* determined in the legislative instrument could include a range of persons, such as lawyers with relevant experience and expertise, or bodies such as a community legal centre, or a student legal service.
8. A government *certifying entity* determined in the legislative instrument would be required to be a *government entity* as that term is to be defined in regulation 1.03 of the Migration Regulations by these Amendment Regulations.
9. As described below, a *certifying entity* under new regulations 2.43A and 2.43B has the role of certifying certain matters in relation to whether a visa holder's visa is to be protected from cancellation.
10. New subregulation 1.15R(2) of the Migration Regulations provides that the Minister may by legislative instrument determine that a matter is a *workplace exploitation matter* for the purposes of regulations 2.43A and 2.43B of the Migration Regulations. As described below, the protections afforded by this measure are only available in relation to a relevant *workplace exploitation matter*.
11. The definition of *workplace exploitation matter* includes a range of circumstances considered to be exploitative. These matters align with the broad intent and remit of the Migrant Workers' Taskforce, they are not confined to the definition of *exploited* under section 245AH of the Migration Act.
12. Legislative instruments made under new regulation 1.15R of the Migration Regulations are exempt from disallowance under section 42 of the *Legislation Act 2003*. This is because a legislative instrument made under Part 1 of the Migration Regulations is prescribed under item 20(b) of section 10 of the *Legislation (Exemption and Other Matters) Regulation 2015* as an instrument not subject to disallowance.

Item [3] – After regulation 2.43

13. This item inserts new regulations 2.43A and 2.43B in the Migration Regulations. These new regulations set out certain protections against visa cancellation where a visa holder has been affected by or subjected to workplace exploitation.

regulation 2.43A – discretionary protection

14. New regulation 2.43A of the Migration Regulations prescribes matters, for the purposes of new subsection 116(1A) of the Migration Act, that the Minister must have regard to in determining under paragraph 116(1)(b) of the Act whether to cancel certain temporary visas for breach of a visa condition.

15. New subregulation 2.43A(1) of the Migration Regulations provides that the new discretionary protection under regulation 2.43A applies in relation to a visa if:
- the visa is a *temporary visa* other than a *criminal justice visa* or an *enforcement visa* (as those terms are defined in subsection 5(1) of the Migration Act)
 - the Minister is satisfied that the visa holder has not complied with a particular condition (pursuant to Schedule 8 of the Migration Act) to which the holder's visa is subject – referred to as the *relevant condition*; and
 - new regulation 2.43B (which sets out a new non-discretionary protection) does not apply.
16. The *Migration Amendment (Strengthening Employer Compliance) Act 2024* (Strengthening Employer Compliance Act) received the Royal Assent on 20 February 2024 and commences on 1 July 2024. The Strengthening Employer Compliance Act implements a range of measures, including the repeal of current subsection 116(1A) of the Migration Act and implementation of new subsections 116(1A) and (1B).
17. New subsection 116(1A) of the Migration Act provides that the Migration Regulations may prescribe matters that the Minister must, must not or may take into account when determining whether to cancel a person's visa.
18. New regulation 2.43A of the Migration Regulations is made pursuant to new subsection 116(1A) of the Migration Act (as amended by the Strengthening Employer Compliance Act). Section 4 of the *Acts Interpretation Act 1901* (Acts Interpretation Act) relevantly provides that if an Act is enacted and at a time after its enactment the Act will confer power to make a legislative instrument etc., the power may be exercised before the start time as if the relevant commencement had occurred.
19. Paragraph 116(1)(b) of the Migration Act provides that the Minister may cancel a visa if he or she is satisfied that the holder of the visa has not complied with a condition of the visa (i.e. a condition in Schedule 8 of the Migration Regulations).
20. In determining whether to cancel a visa, the Minister must have regard to the matters set out in new subsection 2.43A(2) of the Migration Regulations. However, while the Minister must have regard to all of those matters, the Minister will retain the discretion nevertheless to cancel the visa, or not to cancel the visa, whether or not the Minister is satisfied as to any or all of those matters. This discretion enables the Minister to weigh all of the available evidence to support decisions that uphold the good administration of Australia's migration program.
21. New paragraphs 2.43A(2)(a) and (b) of the Migration Regulations prescribe a matter relating to a certificate issued by a *certifying entity* (as that term is defined in the legislative instrument made under new subregulation 1.15R(1)).
22. New paragraph 2.43A(2)(a) of the Migration Regulations applies where the *certifying entity* is a *government entity* (as that term is defined by these Amendment Regulations in regulation 1.03).

23. Under new paragraph 2.43A(2)(a), the Minister must have regard to whether the certificate:
- (i) was issued in relation to the visa holder in respect of a *workplace exploitation matter* (as defined in a legislative instrument made under subregulation 1.15R(2)); and
 - (ii) sets out the matters agreed to by Immigration and the government entity.
24. The reference to ‘Immigration’ in new subparagraph 2.43A(2)(a)(ii) of the Migration Regulations is in effect, under the definition of *Immigration* in regulation 1.03 of the Migration Regulations, a reference to the Department of Home Affairs.
25. It is proposed that the Department consult with relevant government entities engaged in addressing issues of workplace exploitation matters, and that individual agreements will be developed which will set out what the certificate should contain, as agreed between the Department of Home Affairs and the particular government entity, based on their powers and functions.
26. New paragraph 2.43A(2)(b) of the Migration Regulations would apply where the certifying entity is not a government entity (referred to here as a ‘non-government entity’).
27. Under new subparagraph 2.43A(2)(b)(i) of the Migration Regulations, a certificate issued by a non-government entity must state that the certifying entity considers that there is prima facie evidence that the visa holder has been affected by a workplace exploitation matter.
28. The use of the words *affected by* in this provision has been used to clarify that the discretionary protections against cancellation may be available not only to the person directly subject to the workplace exploitation but may also include those affected by the workplace exploitation matter who were not the particular subject of a workplace exploitation matter. For example, this could include a circumstance in which temporary migrant worker A sees temporary migrant worker B being subjected to workplace harassment, and this results in temporary migrant worker A feeling coerced into silence or tacit acceptance because of concerns about maintaining their temporary visa status.
29. Under new subparagraph 2.43A(2)(b)(ii) of the Migration Regulations, a certificate issued by a non-government entity must also state that the time limit in which proceedings can be instituted has not expired. This time limit refers to the statute of limitations in the Commonwealth, State or Territory jurisdiction in which the workplace exploitation is alleged to have occurred.
30. New subparagraph 2.43A(2)(b)(iii) of the Migration Regulations provides that a certificate issued by a non-government entity must also state that the certifying entity considers there is a connection between the circumstances relating to the breach of the relevant condition and the workplace exploitation matter by which the visa holder has been affected.
31. New paragraph 2.43A(2)(c) of the Migration Regulations provides that the Minister must have regard to whether there is a connection between the circumstances leading to the breach of the visa condition and workplace exploitation matter by the visa holder has been affected. This refers to the workplace exploitation matter referred to in the certificate

issued by either a government entity (paragraph 2.43A(2)(a)) or a non-government entity (paragraph 2.43A(2)(b)). The intention is that there must be a connection between the breach of the visa condition and the workplace exploitation matter.

32. The reference to a ‘connection’ in new subparagraph 2.43A(2)(b)(iii) and new paragraph 2.43A(2)(c) of the Migration Regulations is intended to include such circumstances in which workplace exploitation (for example underpayment) resulted in a breach of the visa condition, or circumstances where an *alleged* breach of a visa condition resulted in the visa holder being subject to workplace exploitation (for example threats or unsafe working conditions). The connection must be clearly articulated, noting evidence proving a causal nexus is not reasonably practicable in most circumstances.
33. For example, the Report of the Migrant Workers’ Taskforce noted that some visa holders who had been significantly underpaid below the relevant award were also coerced by the same employer into working additional hours in breach of their visa condition, and in some instances employers used threats of visa cancellation as a means to exploit workers.
34. New paragraph 2.43A(2)(d) of the Migration Regulations provides that under this discretionary protection, the Minister must have regard to whether there is any evidence before the Minister that the visa holder either:
 - was not complying with the purpose of the visa; or
 - is no longer seeking to comply with the purpose of the visa.
35. The ‘purpose’ of the visa generally refers here to the primary criteria for the visa. This could include, for example: undertaking study in the chosen field of study or undertaking skilled work in the nominated profession.
36. Together the requirements and conditions that would be imposed on a particular visa seek to ensure the visa program is able to meet its intended objectives, that is, the purpose of the visa.
37. New paragraph 2.43A(2)(e) of the Migration Regulations provides that the Minister must have regard to whether the person has committed in writing:
 - to take action in a timely manner to resolve the workplace exploitation matter to which the certificate relates; and
 - to comply in future with the visa conditions imposed on the holder’s visa (pursuant to Schedule 8 of the Migration Regulations).
38. The visa holder may make and provide a written statement referred to in new paragraph 2.43A(2)(e) of the Migration Regulations to the Minister prior to the Minister’s determination. While failure by the visa holder to provide the written statement will not necessarily preclude exercise of the discretion not to cancel the visa, the Minister must have regard to such failure in determining whether to cancel the visa.
39. The written statement must state the visa holder’s commitment to take action to resolve the matter and should state the kinds of actions the visa holder intends to undertake to

resolve the workplace exploitation matter. Such action could include, for example seeking administrative redress, taking legal action, or leaving an exploitative employer.

40. New paragraph 2.43A(2)(f) of the Migration Regulations provides that the Minister must have regard to whether the visa holder has failed to comply with any written commitment they previously made under regulations 2.43A or 2.43B to:

- take action to resolve the workplace exploitation matter in a timely manner; and
- comply in future with the conditions pursuant to Schedule 8 of the Migration Regulations to which the holder's visa is subject.

41. The intention is that the Minister, when determining whether to provide discretionary protection against cancellation, must have regard to whether the visa holder has taken, or will take, action, in accordance with a written commitment, to resolve the workplace exploitation matter in a timely manner and to comply with the conditions imposed on their visa.

subregulation 2.43A(3) – other powers or duties to cancel

42. New subregulation 2.43A(3) of the Migration Regulations provides that new subregulation 2.43A(2) does not limit any power or duty of the Minister to cancel a visa under:

- paragraph 116(1)(b) of the Migration Act for non-compliance with a condition (pursuant to Schedule 8 of the Migration Regulations) other than the *relevant condition*.
- a provision of the Migration Act other than paragraph 116(1)(b) of the Migration Act.

43. As an example, it would still be open to the Minister to cancel a visa holder's visa under paragraph 116(1)(b) of the Migration Act for non-compliance with a condition pursuant to Schedule 8 of the Migration Regulations of the holder's visa other than a condition relevant to new subregulation 2.43A of the Migration Regulations.

44. As another example, it would still be open to the Minister to cancel a visa holder's visa under paragraph 116(1)(fa) of the Migration Act on the ground that the holder is not a genuine student or the holder has engaged in conduct not contemplated by the visa.

45. The note under proposed subregulation 2.43A(3) notes that subregulation 2.43(2) of the Migration Regulations prescribes the circumstances in which the Minister must cancel a person's visa.

46. Subregulation 2.43(2) of the Migration Regulations prescribes, for subsection 116(3) of the Migration Act, circumstances in which the Minister must cancel a person's visa. The intention is that the Minister must cancel a person's visa if the circumstances prescribed in subregulation 2.43(2) of the Migration Regulations apply, even if new subregulation 2.43A would otherwise apply to the visa holder.

regulation 2.43B – non-discretionary protection

47. New regulation 2.43B of the Migration Regulations prescribes for subsection 116(2) of the Migration Act circumstances in which the Minister is not to cancel certain temporary visas for breach of a restricted work condition.

48. New subregulation 2.43B(1) of the Migration Regulations provides that regulation 2.43B applies in relation to a visa if:

- the visa is a *temporary visa* other than a *bridging visa*, a *criminal justice visa*, or an *enforcement visa* (as those terms are defined in subsection 5(1) of the Migration Act);
- the visa is subject to a condition pursuant to Schedule 8 of the Migration Regulations restricting the work that the visa holder may do in Australia (other than a condition such as condition 8101 prohibiting the visa holder from undertaking any work in Australia) – referred to as a *restricted work condition*; and
- the Minister is satisfied that the visa holder has not complied with the *restricted work condition*.

49. Paragraph 116(1)(b) of the Migration Act provides that the Minister may cancel a visa if he or she is satisfied that the holder of the visa has not complied with a condition of the visa.

50. Subsection 116(2) of the Migration Act provides that the Minister is not to cancel a visa under subsection 116(1), (1AA), (1AB) or (1AC) of the Act if there exist prescribed circumstances in which a visa is not to be cancelled.

subregulation 2.43B(2) – Certificate issued by a certifying entity that is a government entity

51. New subregulation 2.43B(2) of the Migration Regulations provides that for the purposes of subsection 116(2) of the Migration Act, the Minister is not to cancel a visa under paragraph 116(1)(b) of the Migration Act if *all* of the circumstances provided in paragraphs 2.43B(2)(a)–(d) exist.

52. New subsection 2.43B(2) of the Migration Regulations applies where the *certifying entity* (as that term is defined in new subregulation 1.15R(1)) is a *government entity* (as that term is proposed by these Amendment Regulations in regulation 1.03).

53. New paragraph 2.43B(2)(a) of the Migration Regulations prescribes a circumstance that a government entity has issued a written certificate in relation to the visa holder in respect of a workplace exploitation matter. This certificate must set out the matters agreed to by Immigration and the government entity issuing the certificate.

54. The reference to ‘Immigration’ in new paragraph 2.43B(2)(a) is in effect, under the definition of *Immigration* in regulation 1.03 of the Migration Regulations, a reference to the Department of Home Affairs.

55. It is proposed that the Department of Home Affairs will enter into agreements with Commonwealth, State or Territory government entities that will issue these certificates,

and that these individual agreements will set out what the certificate should contain as between the Department of Home Affairs and the particular government entity.

56. New paragraph 2.43B(2)(b) of the Migration Regulations prescribes a circumstance (where the certifying entity is a government entity) that the Minister is satisfied that there is a connection between the circumstances relating to the breach of the restricted work condition and the workplace exploitation matter to which the certificate relates. The intention is that there must be a connection between the breach of the visa condition and the workplace exploitation matter.
57. New paragraph 2.43B(2)(c) of the Migration Regulations prescribes a circumstance (where the certifying entity is a government entity) that the Minister is satisfied that the visa holder will comply in future with the purpose of the visa. The ‘purpose’ of the visa refers here to the actions that the visa holder is supposed to be undertaking under their visa. This could include, for example, undertaking studies, performing work aimed at addressing gaps in the labour market etc. The intention of this provision is uphold the intended purpose of the visa program.
58. New paragraph 2.43B(2)(d) of the Migration Regulations prescribes a circumstance (where the certifying entity is a government entity) that the visa holder has committed in writing to take action:
- (i) to resolve the workplace exploitation matter to which the certificate relates in a timely manner; and
 - (ii) to comply in future with the visa conditions (pursuant to Schedule 8 of the Migration Regulations) imposed on the holder’s visa.
59. The written statement must state the visa holder’s commitment to take action to resolve the matter and should state the kinds of actions the visa holder intends to undertake to resolve the workplace exploitation matter. Such action could include, for example, seeking administrative redress, taking legal action, or leaving an exploitative situation.
60. The written statement must also state the visa holder’s commitment to comply in future with the conditions (pursuant to Schedule 8 of the Migration Regulations) of the holder’s visa.
61. As the opening of new subsection 2.43B(2) of the Migration Regulations states that all of the prescribed circumstances must exist, the non-discretionary protection will not be available if any of the prescribed circumstances do not exist. For example, the non-discretionary protection under new subregulation 2.43B(2) will not be available if the visa holder does not provide the written statement referred to in new paragraph 2.43B(2)(d).
- subregulation 2.43B(3) – Certificate issued by a certifying entity that is not a government entity – workplace exploitation less than 12 months prior to issue of certificate*
62. New subregulation 2.43B(3) of the Migration Regulations provides that for the purposes of subsection 116(2) of the Migration Act, the Minister is not to cancel a visa under paragraph 116(1)(b) of the Migration Act if *all* of the circumstances provided in paragraphs 2.43B(3)(a)–(d) exist.

63. New subsection 2.43B(3) applies where the *certifying entity* (as that term is defined in proposed subregulation 1.15R(1)) is not a *government entity* (as that term is proposed to be defined in regulation 1.03) – referred to here as a ‘non-government entity’.
64. New subparagraph 2.43B(3)(a)(i) of the Migration Regulations prescribes a circumstance that a non-government entity has certified in writing that the entity considers that there is prima facie evidence that the visa holder is currently, or has been within the 12 month period preceding certification, the subject of a workplace exploitation matter. However, new subregulation 2.43B(4) (as described below) prescribes certain circumstances in which this time requirement would not apply.
65. New subparagraph 2.43B(3)(a)(i) of the Migration Regulations refers to the visa holder being ‘the subject of’ a workplace exploitation matter. This provision is intended to have a narrower application to limit the non-discretionary protection against visa cancellation to visa holders who have been directly subjected to workplace exploitation. It will not be sufficient to attract the non-discretionary protection under proposed subsection 2.43B(3) if, for example, the visa holder merely sees another worker being subjected to workplace exploitation.
66. New subparagraph 2.43B(3)(a)(ii) of the Migration Regulations prescribes a circumstance that the certificate states that the non-government entity considers that there is a connection between the circumstances relating to the breach of the restricted work condition and the workplace exploitation matter to which the visa holder is, or has been, subject.
67. New paragraph 2.43B(3)(b) of the Migration Regulations provides additionally that the Minister is to be satisfied that there is a connection between the circumstances resulting in the breach of the restricted work condition and the workplace exploitation matter to which the visa holder has been subject.
68. For both new subparagraph 2.43B(3)(a)(ii) and new paragraph 2.43B(3)(b) of the Migration Regulations, the intention is that there must be a connection between the breach of the visa condition and the workplace exploitation matter.
69. New paragraph 2.43B(3)(c) of the Migration Regulations prescribes a circumstance that the Minister is satisfied that the visa holder will comply in future with the purpose of the visa.
70. New paragraph 2.43B(3)(d) of the Migration Regulations prescribes a circumstance that the visa holder has committed in writing to take action:
- (i) to resolve the workplace exploitation matter to which the certificate relates in a timely manner; and
 - (ii) to comply in future with the visa conditions (pursuant to Schedule 8 of the Migration Regulations) imposed on the holder’s visa.
71. The written statement must state the visa holder’s commitment to take action to resolve the matter and should ideally state the kinds of actions the visa holder intends to undertake to resolve the workplace exploitation matter and. Such action could include, for

example, seeking administrative redress, taking legal action or leaving an exploitative employer.

72. The written statement must also state the visa holder's commitment to comply in future with the conditions of the holder's visa (pursuant to Schedule 8 of the Migration Regulations).
73. As the opening of proposed subregulation 2.43B(3) of the Migration Regulations states that all of the prescribed circumstances must exist, the non-discretionary protection will not be available if any of the prescribed circumstances do not exist. For example, the non-discretionary protection under subsection 2.43B(3) will not be available if the visa holder does not provide the written statement referred to in proposed paragraph 2.43B(3)(d).

subregulation 2.43B(4) – Certificate issued by a certifying entity that is not a government entity – further circumstances

74. New subregulation 2.43B(4) of the Migration Regulations prescribes for subsection 116(2) of the Migration Act a further set of circumstances in which the Minister is not to cancel a person's visa.
75. New subsection 2.43B(4) applies where the certifying entity (as that term is defined in proposed subregulation 1.15R(1)) is not a government entity (as that term is proposed to be defined in regulation 1.03) – referred to here as a 'non-government entity'.
76. New subregulation 2.43B(4) of the Migration Regulations prescribes that the Minister is not to cancel a visa under paragraph 116(1)(b) of the Migration Act if *all* of the circumstances provided in paragraphs 2.43B(4)(a)–(d) exist.
77. New subparagraph 2.43B(4)(a)(i) of the Migration Regulations prescribes a circumstance that a non-government entity has certified in writing that the entity considers that there is prima facie evidence that the visa holder has been the subject of a workplace exploitation matter more than 12 months before the certificate is made. This refers to a workplace exploitation that ceased more than 12 months before the certification and is not ongoing at that time.
78. The reference in new subparagraph 2.43B(4)(a)(i) of the Migration Regulations to the visa holder being the 'subject of' a workplace exploitation matter is intended to narrow the application of the non-discretionary protection. The visa holder must themselves have been the subject of the relevant workplace exploitation matter. It will not be sufficient for the non-discretionary protection for the visa holder to have only been 'affected by' a workplace exploitation matter. For example, the non-discretionary protection will not apply if a visa holder merely sees another temporary migrant worker being subjected to workplace exploitation.
79. New subparagraph 2.43B(4)(a)(ii) of the Migration Regulations prescribes a circumstance that the certificate states that the non-government entity considers that there is a connection between the circumstances relating to the breach of the restricted work condition and the workplace exploitation matter to which the visa holder is, or has been, subject.

80. New subparagraph 2.43B(4)(b)(i) of the Migration Regulations prescribes a circumstance that the Minister is satisfied the workplace exploitation matter to which the visa holder has been subject is serious or systemic in nature. The aim is to encourage the timely reporting and resolution of workplace exploitation matters, while recognising that there may be circumstances in which there remains a strong case for applying the protection despite having opportunities to address the matter earlier. Cases that meet the serious or systemic threshold are cases that receive active representation by the certifying body, recognising certifying bodies have limited resources and must therefore triage cases based on whether they are serious (have significant financial implications in terms of compensation) or systemic (they apply to a number of claimants for the one matter) in nature.
81. New paragraph 2.43B(4)(b)(ii) of the Migration Regulations additionally prescribes a circumstance that the Minister is satisfied there is a connection between the circumstances relating to the breach of the restricted work condition and the workplace exploitation matter.
82. For both new subparagraph 2.43B(4)(a)(ii) and new paragraph 2.43B(4)(b)(ii) of the Migration Regulations, the reference to a ‘connection’ is intended to include such circumstances in which workplace exploitation (for example underpayment) resulted in a breach of the visa condition, or circumstances where an *alleged* breach of a visa condition resulted in the visa holder being subject to workplace exploitation (for example threats or unsafe working conditions).
83. New paragraph 2.43B(4)(c) of the Migration Regulations prescribes a circumstance the Minister is satisfied that the visa holder will comply in future with the purpose of the visa.
84. The ‘purpose’ of the visa refers here to the primary criteria for the visa. This could include, for example, undertaking studies, performing skilled work etc.
85. New paragraph 2.43B(4)(d) of the Migration Regulations prescribes a circumstance that the visa holder has committed in writing to take action:
- (i) to resolve the workplace exploitation matter in a timely manner; and
 - (ii) to comply in future with the visa conditions (pursuant to Schedule 8 of the Migration Regulations) imposed on the holder’s visa.
86. The written statement must state the visa holder’s commitment to take action to resolve the matter and should state the kinds of actions the visa holder intends to undertake to resolve the workplace exploitation matter. Such action could include, for example, seeking administrative redress, taking legal action or leaving an exploitative situation.
87. The written statement must also state the visa holder’s commitment to comply in future with the conditions of the holder’s visa (pursuant to Schedule 8 of the Migration Regulations).
88. As the opening of new subsection 2.43B(4) of the Migration Regulations states that all of the prescribed circumstances must exist, the non-discretionary protection will not be available if any of the prescribed circumstances do not exist. For example, the non-

discretionary protection under new subsection 2.43B(4) will not be available if the visa holder does not provide the written statement referred to in new paragraph 2.43B(4)(d).

subregulation 2.43B(5) – failure to comply with written commitment

89. New subregulation 2.43B(5) of the Migration Regulations provides that the non-discretionary protection in subregulations 2.43B(2), (3) and (4) do not apply if the visa holder has failed to comply with any written commitment they previously made under proposed regulations 2.43A or 2.43B to:

- take action to resolve the workplace exploitation matter in a timely manner; and
- comply in future with the conditions pursuant to Schedule 8 of the Migration Regulations to which the holder’s visa is subject.

90. An effect of subregulation 2.43B(5) of the Migration Regulations would be that the non-discretionary protection under new regulation 2.43B would generally only be available once per visa held by the visa holder. However, it may still be possible for a visa holder who has already been the beneficiary of the non-discretionary protection for a particular visa under new regulation 2.43B to be considered for the discretionary protection for that visa under new regulation 2.43A. This means the workplace exploitation matter could still be considered, alongside other considerations, with the protection provided depending on the merits of the case.

subregulation 2.43B(6) – other powers or duties to cancel

91. New subregulation 2.43B(6) of the Migration Regulations provides that subregulations 2.43B(2), (3) and (4) do not limit any power or duty of the Minister to cancel a visa under:

- paragraph 116(1)(b) of the Migration Act for non-compliance with a condition (pursuant to Schedule 8 of the Migration Regulations) other than the restricted work condition.
- a provision of the Migration Act other than paragraph 116(1)(b) of the Migration Act.

92. As an example, it would still be open to the Minister to cancel a visa holder’s visa under paragraph 116(1)(b) of the Migration Act for non-compliance with a condition (pursuant to Schedule 8 of the Migration Regulations) of the holder’s visa other than the *restricted work condition*.

93. As another example, it would still be open to the Minister to cancel a visa holder’s visa under paragraph 116(1)(fa) of the Migration Act on the ground that the holder is not a genuine student or the holder has engaged in conduct not contemplated by the visa.

94. The note under new subregulation 2.43B(6) notes that subregulation 2.43(2) of the Migration Regulations prescribes the circumstances in which the Minister must cancel a visa.

95. Subregulation 2.43(2) of the Migration Regulations prescribes, for subsection 116(3) of the Migration Act, circumstances in which the Minister must cancel a person's visa. The intention is that the Minister must cancel a person's visa if the circumstances prescribed in subregulation 2.43(2) of the Migration Regulations apply, even if the circumstances in proposed regulation 2.43B would otherwise apply to the visa holder.

Item [4] – In the appropriate position in Schedule 13

96. This item inserts Part 135 in the appropriate position in Schedule 13. This item provides the operation of amendments made by Schedule 1 apply in relation to a breach of a condition to which a visa is subject that occurs before, on or after 1 July 2024.