

EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration (Strengthening Reporting Protections—LIN 24/057) Instrument 2024

1. The instrument *Migration (Strengthening Reporting Protections—LIN 24/057) Instrument 2024* (departmental reference LIN 24/057) is made under subregulations 1.15R(1) and 1.15R(2) in Division 1.2 of Part 1 of the *Migration Regulations 1994* (Migration Regulations).
2. The instrument commences on the day after it is registered on the Federal Register of Legislation. The instrument is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

3. The *Migration Amendment (Strengthening Reporting Protections) Regulations 2024* (the Strengthening Reporting Protections Regulations) commenced on 1 July 2024, amending the Migration Regulations.
4. The Strengthening Reporting Protections Regulations amended the Migration Regulations to prescribe matters that the Minister must have regard to in determining under paragraph 116(1)(b) of the *Migration Act 1958*, whether to cancel certain temporary visas for a breach of a visa condition in certain circumstances. The Strengthening Reporting Protections Regulations also prescribe:
 - circumstances in which the visa of a temporary migrant worker who has been subject to 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***).
5. The Strengthening Reporting Protections Regulations enhance the protections available to migrant workers to provide them with confidence to report a workplace exploitation matter.
6. Further information about the Strengthening Reporting Protections can be found in the Explanatory Statement for those Regulations.
7. As amended by the Strengthening Reporting Protections Regulations, the Migration Regulations provide for a legislative instrument to be made by the Minister to specify the following matters:
 - the persons, bodies or government entities that may issue a certificate as to a matter of workplace exploitation; and
 - the kind of matters relating to workplace exploitation that may be set out in the certificate.

8. The purpose of LIN 24/057 is to specify those matters in a legislative instrument.
9. Further details of the instrument are set out in the **Attachment**.

Consultation

10. The Department of Home Affairs consulted relevant government agencies, including the Department of Employment and Workplace Relations and the Fair Work Ombudsman. The consultation outcomes were considered and informed the drafting of the instrument. Policy settings were also informed by consultation with practitioners engaged in supporting temporary migrant workers to pursue workplace exploitation matters and academics with a background in researching the barriers temporary migrants cite for not reporting exploitation.
11. The Office of Impact Analysis (OIA) was consulted and considered that the proposal does not trigger the Australian Government's Impact Analysis requirements and no regulatory impact statement was required. The OIA reference number is OIA23-05660.

Parliamentary scrutiny etc.

12. This instrument is exempt from disallowance under section 42 of the *Legislation Act 2003* (the Legislation Act). Paragraph 44(2)(b) of the Legislation Act provides that section 42 of that Act does not apply if a legislative instrument is prescribed by regulation for the purposes of that paragraph. This instrument is made under Part 1 of the Migration Regulations, which is prescribed under item 20(b) of regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.
13. As the instrument is exempt from disallowance, under paragraph 15J(2)(f) of the Legislation Act a Statement of Compatibility with Human Rights is not required.
14. The instrument was made by the Minister for Immigration, Citizenship and Multicultural Affairs in accordance with subregulations 1.15R(1) and 1.15R(2) in Division 1.2 of Part 1 of the Migration Regulations.
15. The Migration Regulations specify no conditions that need to be satisfied before the power to make the instrument may be exercised.

Details of the *Migration (Strengthening Reporting Protections—LIN 24/057) Instrument 2024*

Section 1 Name

1. This section provides that the name of the instrument is the *Migration (Strengthening Reporting Protections—LIN 24/057) Instrument 2024* (the instrument).

Section 2 Commencement

2. This section provides that the instrument commences on the day after registration on the Federal Register of Legislation.

Section 3 Authority

3. This section provides that the instrument is made under subregulations 1.15R(1) and 1.15R(2) in Division 1.2 of Part 1 of the *Migration Regulations 1994* (Migration Regulations).

Section 4 Definitions

4. This section provides for definitions used or referred to in the instrument.

Section 5 Persons, bodies and government entities

5. This section specifies persons, bodies and government entities as certifying entities for the purposes of regulations 2.43A and 2.43B and under subregulation 1.15R(1) of the Migration Regulations.
6. The term *government entity* is defined in subitem 1237(8) of Schedule 1 to the Migration Regulations for item 1237 as meaning:
 - a Department, 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.
7. This section determines the following persons, bodies and government entities as certifying entities:
 - The Office of the Fair Work Ombudsman
 - Australian Rail, Tram and Bus Industry Union (ARTBIU)
 - Australian Workers' Union
 - Australasian Meat Industry Employees' Union
 - Electrical Trades Union of Australia National Council
 - Human Rights Law Centre
 - Migrant Workers Centre
 - Redfern Legal Centre Ltd
 - SA Unions
 - Shop, Distributive and Allied Employees' Association (the Association)
 - Unions Tasmania
 - The Association of Professional Engineers, Scientists and Managers
 - UnionsACT

- Transport Workers' Union of Australia
 - Unions NSW
 - UnionsWA
 - United Workers Union (UWU)
 - Western Community Legal Centre Ltd (Westjustice).
8. The *Migration Amendment (Strengthening Reporting Protections) Regulations 2024* (Strengthening Reporting Protections Regulations) inserted new regulations 2.43A and 2.43B into Division 2.9 of Part 2 of the Migration Regulations. These provisions respectively provide for discretionary and non-discretionary protections against visa cancellation.

The discretionary protection against visa cancellation

9. Regulation 2.43A of the Migration Regulations prescribes matters, for the purposes of paragraph 116(1A)(a) of the *Migration Act 1958* (Migration Act), that the Minister must have regard to in determining under paragraph 116(1)(b) of that Act whether to cancel certain temporary visas for breach of a visa condition.
10. Paragraph 2.43A(2)(a) provides that one matter that the Minister must have regard to is any written certificate issued by a certifying entity that is a government entity if the certificate:
- (i) was issued in relation to the visa holder in respect of a workplace exploitation matter; and
 - (ii) sets out the matters agreed to by Immigration and the government entity.
11. Paragraph 2.43A(2)(b) provides that one matter that the Minister must have regard to is any written certificate issued by a certifying entity that is not a government entity and states that the entity considers that:
- (i) there is prima facie evidence that the visa holder has been affected by a workplace exploitation matter; and
 - (ii) of any law limits the time in which a proceeding may be instituted, or a complaint made, in relation to the workplace exploitation matter – that time has not expired; and
 - (iii) there is a connection between the circumstances relating to the breach of the relevant condition and the workplace exploitation matter in which a certificate mentioned in paragraph (a) or (b) relates.

The non-discretionary protection against visa cancellation

12. Regulation 2.43B of the Migration Regulations prescribes, for the purposes of subsection 116(2) of the Migration Act, circumstances in which the Minister is not to cancel certain temporary visas under subsection 116(1)(b) of the Migration Act for breach of a restricted work condition.
13. Paragraph 2.43B(2)(a) of the Migration Regulations provides that the Minister is not to cancel a visa under paragraph 116(1)(b) of the Migration Act, if amongst other things, a certifying entity that is a government entity has issued a written certificate in relation to the visa holder in respect of a workplace exploitation matter that sets out the matters agreed by Immigration and the government entity.
14. Paragraph 2.43B(3)(a) of the Migration Regulations provides that the Minister is not to cancel a visa under paragraph 116(1)(b) of the Migration Act, if amongst other things, a certifying entity that is not a government entity has issued a written certificate stating that the entity considers that:

- (i) there is prima facie evidence that the visa holder is currently, or has been within the 12-month period preceding the issue of the certificate, the subject of a workplace exploitation matter; and
 - (ii) 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.
15. The effect of section 5 of the instrument is that the persons, bodies or government entities specified are certifying entities for the purposes of regulations 2.43A and 2.43B. These certifying entities may issue a certificate in respect of a workplace exploitation matter for the purposes of these regulations. This written certificate will be a matter that the Minister must have regard to for the discretionary protection against visa cancellation under regulation 2.43A to be available. The issuing of this written certificate is a circumstance that must exist for the non-discretionary protection under regulation 2.43B to be available if a restricted work condition was breached.

Section 6 Matters relating to workplace exploitation

16. This section specifies that the following matters are a workplace exploitation matter for the purposes of regulations 2.43A and 2.43B and under subregulation 1.15R(2) of the Migration Regulations:
- (a) underpayment or non-payment of workplace entitlements;
 - (b) unlawful, unpaid or underpaid training or trials;
 - (c) up-front payment or deposit for a job;
 - (d) misclassification of workers as independent contractors instead of employees;
 - (e) unlawful deductions from wages;
 - (f) unfair dismissal;
 - (g) non-compliance with workplace health and safety requirements;
 - (h) bullying, in relation to work or an arrangement in relation to work;
 - (i) sexual harassment, in relation to work or an arrangement in relation to work;
 - (j) discrimination, in relation to work or an arrangement in relation to work; and
 - (k) coercion, undue influence or pressure, or misrepresentation, in relation to work or an arrangement in relation to work.
17. Subregulation 1.15(2) operates to provide the workplace exploitation matters for the purposes of regulations 2.43A and 2.43B. The protections afforded in regulation 2.43A and 2.43B are only available in circumstances where a certifying entity has issued a written certificate in relation to a workplace exploitation matters that is specified under subregulation 1.15(2) of the Migration Regulations.
18. The workplace exploitation matters generally correspond with (but are not limited to) breaches under the *Fair Work Act 2009*. Section 6 does not rely on the definition of “exploitation” set out in section 271.1A of the *Criminal Code* that applies for the purposes of Divisions 270 and 271 of that Act.