Law Council
OF AUSTRALIA

Migration Amendment (Protecting Migrant Workers) Bill 2021

Senate Legal and Constitutional Affairs Legislation Committee

28 January 2022

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
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Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia is grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society and the Federal Litigation and Dispute Resolution's Migration Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to provide a submission for the purposes of its inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021 (**Bill**).

2. The Law Council welcomes and supports legislative reform to strengthen existing protocols to address worker exploitation involving migrant workers in Australia.

3. Migrant workers are vulnerable to exploitative workplace practices, and often possess little to no means of redress due to legal, social and economic impediments, as identified in the Report of the Migrant Workers' Taskforce (March 2019) (**Taskforce Report**).[2]

4. The Law Council considers the proposals in the Bill are good faith attempts to give effect to several recommendations in the Taskforce Report directed at strengthening the regulation of employers of migrant workers, including through broadening criminal sanctions.

5. This submission identifies the aspects of the Bill which the Law Council supports and those which it considers could be improved. The submission builds upon a submission made to the Department of Home Affairs (**Department**) regarding an Exposure Draft of the Bill.[3] The Law Council notes that the Department replied in writing to the Law Council's submission regarding its proposals and is pleased that amendments have been made to the Bill which reflect a number of the Law Council's recommendations.

6. In summary, the Law Council:

Regarding the new work-related offences, civil penalty provisions and compliance tools

- supports the new introduction of work-related offences and civil penalty provisions and additional compliance tools for breaches;
- considers that the new offences will have a more effective impact if enforcement efforts are also increased;
- suggests consideration be given to a number of proposed drafting improvements;

Regarding the engagement with migrant workers

- suggests the Department consider measures to encourage migrant workers to make complaints and support them in that process, and provide an update on the review of the Assurance Protocol with the Fair Work Ombudsman (**FWO**);
- suggests the Australian Government consider the introduction of a new migrant worker exploitation visa which would enable a person who has made a credible report of having experienced workplace exploitation to hold a short-term visa while working for a different employer;

Regarding the prohibited employer declaration scheme

[2] Professor Allan Fels AO and Professor David Cousins AM, Report of the Migrant Workers' Taskforce (March 2019), <https://www.ag.gov.au/industrial-relations/publications/report-migrant-workers-taskforce>.
[3] Law Council of Australia, 'Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021', <link>, 24 August 2021.

- generally supports the introduction of the prohibited employer declaration scheme;
- suggests consideration be given to a number of proposed improvements to this scheme, including, most substantively:
    - the discretion to make a prohibited employer declaration be subject to criteria imposed by the Bill, rather than an option for these criteria to be prescribed in regulations;
    - there be a limit or statutory guidance regarding the period for which a prohibited employer declaration may be made;
    - the prohibited employer declaration be subject to common law procedural fairness principles, rather than a code of procedure which manifests an exhaustive statement of the natural justice hearing rule;
    - consideration be given to amending the Bill to apply the prohibited employer declaration scheme only in relation to conduct which post-dates the commencement of the provisions making up the scheme.

Regarding the mandatory use of a computer system to check visa status

- generally supports the establishment of civil penalty provisions to require a person to use the Visa Entitlement Verification Online system (**VEVO**) system to determine a person's visa status before starting to allow a person to work or referring them to work; and
- suggests, however, that the Department ensure regulations are made which permit a person to access the information required for these provisions from sources other than VEVO, when the information cannot be sourced from VEVO.

Overview of the measures in the Bill

Summary of the measures

7. The Bill will amend the *Migration Act 1958* (Cth) (**Migration Act**) to create new criminal offences and civil penalties for prohibited conduct of employers of migrant workers, and introduce additional regulatory functions relating to the enforcement of work-related offences and provisions in the Migration Act.

8. Specifically, in summary, the Bill will:

- create offences and civil penalties for prohibited conduct in which a person *coerces, or exerts undue influence or undue pressure on* a non-citizen to accept or agree to a work arrangement, either which will breach visa conditions or in order to avoid an adverse immigration outcome (**new work-related offences and penalty provisions**) (Part 1 of Schedule 1);
- increase the penalties which apply to **existing work-related offences and civil penalties** which apply in situations where a person *allows* or *refers* an unlawful non-citizen to, or for, work or a person to work in breach of their visa conditions (Part 4 of Schedule 1);
- create a new power for the Minister to declare a person who has contravened a work-related requirement involving migrants to be a 'prohibited employer' and

provide for civil penalties if a 'prohibited employer' employs additional non-citizens during the period of a declaration (**prohibition declaration scheme**) (Part 2 of Schedule 1);

- provide for civil penalties for prohibited conduct in which a person allows or refers a non-citizen for work without determining whether the non-citizen has the required permission to work by using information from a prescribed computer system (Part 3 of Schedule 1); and

- introduce certain regulatory functions relating to the enforcement of work-related offences and provisions in the Migration Act, including enforceable undertakings (Part 5 of Schedule 1) and compliance notices (Part 6 of Schedule 1), and empower the Minister to delegate those powers and functions to an authorised officer the Minister is satisfied has the appropriate qualifications, training or experience to exercise the power or perform the function (Part 7 of Schedule 1).

9. Further discussion of a number of these measures, including suggestions to further improve and develop aspects of the measures, is set out below.

New work-related offences and penalty provisions

Description of the new offences

Prohibition on work arrangements which breach visa conditions

10. Clause 245AAA prohibits a person (**prospective employer**) coercing or exerting undue pressure or influence on a non-citizen to accept or agree to a work arrangement in Australia which either results in the breach of 'work-related condition'[4] or 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'.[5]

11. To commit an *offence* under clause 245AAA, the prospective employer must:

- intend to coerce or exert undue pressure or influence on a visa holder to accept or agree to a work arrangement;[6] and

- either know that the non-citizen would breach a work-related condition as a result of that arrangement or be reckless to that outcome.[7]

12. To be liable for a *civil penalty* under clause 245AA, all that matters is that the contravention has occurred – the state of mind of the prospective employer is irrelevant.[8]

13. That is, if the prospective employer coerces a non-citizen to accept a work arrangement and as a result of that arrangement, the non-citizen breaches a work-related condition:

- it will be a civil penalty regardless of whether the prospective employer countenanced the possibility of the breach; and

[4] A work-related condition is a condition prohibiting or restricting work by a visa holder in Australia – see subsection 5(1) of the Migration Act.
[5] Subclause 245AAA(1).
[6] As no fault element is specified for paragraph 245AAA(1)(a), the default fault element, 'intention', applies – see subclause 5.6(1) of Schedule 1 to the *Criminal Code Act 1995* (Cth) (**the Criminal Code**).
[7] Subclause 245AAA(3).
[8] Section 486ZF of the Migration Act.

- it will only be an offence if the prospective employer knew the breach would result or was reckless to that possibility.

14. The practical effect of clause 245AAA is to place an onus on employers to ensure work arrangements are compliant with work-related visa conditions.

Prohibition on work arrangements which must be accepted to avoid an adverse immigration outcome

15. Clause 245AAB prohibits a prospective employer coercing or exerting undue pressure or influence on a visa holder to accept or agree to a work arrangement in Australia which the visa holder believes, or there are reasonable grounds to believe, the visa holder must accept or agree to the arrangement to:

    - satisfy a 'work-related visa requirement'; or

    - to avoid 'an adverse effect on the non-citizen's immigration status under Division 1 [of Part 2 of the Migration Act]'.

16. A work-related visa requirement is a requirement under migration law to provide, in connection with a visa or visa application, information or evidence about work the non-citizen has undertaken in Australia.[9]

17. The reference to 'a non-citizen's immigration status under Division 1' is to Division 1 of Part 2 of the Migration Act, which provides that a non-citizen in the migration zone is either a lawful non-citizen (because they hold a visa which is in effect)[10] or is an unlawful non-citizen (because they do not hold a visa which is in effect).[11]

18. Again, while mere contravention of clause 245AAB gives rise to liability for a civil penalty provision, to commit an offence under section 245AAB, the person must:

    - *intend* to coerce or exert undue pressure or influence on a visa holder to accept or agree to a work arrangement; and

    - either *know* that the visa holder believes or there are reasonable grounds for the visa holder to believe, that they must accept or agree to the arrangement to satisfy a work-related visa requirement or avoid an adverse effect on their immigration status, or be reckless to that possibility.[12]

19. The practical effect of clause 245AAB is to place an onus on employers to ensure that a non-citizen does need feel threatened to accept a work in order to remain a valid visa holder.

Headline comments

20. The Law Council considers that the new work-related offences and penalty provisions are consistent with the Taskforce recommendations and if properly enforced, will assist to address the migrant worker exploitation identified in the Taskforce Report.

[9] Proposed subsection 245AAB(5) of the Migration Act as to be inserted by item 4 of Sch 1 to the Bill.
[10] Section 13 of the Migration Act.
[11] Ibid, section 14.
[12] Subclause 245AAB(3).

21. According to the Explanatory Memorandum for the Bill, the new work-related offences and penalty provisions were introduced to address Recommendation 19 of the Taskforce Report.[13]

22. Recommendation 19 states:

> *It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence*.

23. This recommendation was made in the context of the Taskforce hearing of cases where employers have:

- persuaded students to work longer hours than permitted (**scenario 1**); or
- persuaded students to accept lower wages on the threat of reporting them for breaching the hours' restriction (**scenario 2**); or
- rationed work and sought other benefits before signing off on completion of the three-month qualifying period applying to working holiday makers who wish to benefit from a second year on a Working Holiday Maker (subclass 417 and 462) visa (**scenario 3**).[14]

24. Recommendation 19 is effectively dealt with by clause 245AAA – specifically, the prohibition on an employer coercing a visa holder to agree to an arrangement that would breach a work-related requirement, such as working hours longer than permitted (scenario 1).

25. Clause 245AB applies to conduct which is not captured in Recommendation 19 itself, but would address the conduct issues identified in scenario 2 (a threat to report a breach of a visa requirement which would affect their immigration status) and scenario 3 (withholding signature on work until an arrangement is agreed). The Law Council supports this approach.

Analysis

'Undue' pressure or influence

26. The first limb of all new work-related offences (setting aside the civil penalty provisions for now) is that a person (intentionally) coerces or exerts undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work.

27. These terms are not defined, and the Explanatory Memorandum for the Bill confirms that the intention is that the meaning of these terms is to be left to general law.[15] Relevantly, the Macquarie Dictionary defines 'undue' in the context of exerting undue influence as 'not proper, fitting, or right; unjustified'.[16]

28. There may be a question about the necessity of including the term 'undue' in relation to the offence in subclause 245AAA(2). That offence is committed if the prospective employer exerts undue influence on a non-citizen to accept or agree to a work arrangement and the prospective employer knows that the proposed work arrangement

[13] Explanatory Memorandum, Migration Amendment (Protecting Migrant Workers) Bill 2021, 3 and 94....
[14] Professor Allan Fels AO and Professor David Cousins AM, Report of the Migrant Workers' Taskforce (March 2019), above, n 2.
[15] Explanatory Memorandum, [28].
[16] *Concise Macquarie Dictionary*, (8th ed) 'undue'.

will cause the visa holder to breach a work-related condition (eg, by working more hours than permitted), or is reckless to that possibility.

29. Arguably, if the prospective employer knows that the proposed work arrangement will cause the visa holder to breach a work-related condition (or is reckless to that possibility), *any* degree of influence or pressure exerted to accept or agree to that arrangement could fairly be characterised (as a matter of policy) as being undue, and meritorious of criminal sanction.

30. Given this, it is questionable as to whether there is any discernible benefit from separately and additionally requiring the prosecution to establish, to the criminal standard of proof, that the particular degree of 'influence' or 'pressure' exerted on the employee was 'undue' for the purpose of paragraph 245AAA(1)(a).

31. In fact, requiring proof of the physical element of 'undue' influence or pressure paragraph 245AAA(1)(a) may have the effect of allowing morally culpable conduct to go unpunished, because of the following circumstances:

- the policy position noted above—namely, a view that culpability should, as a matter of policy, be established where a person knows of, or is reckless in relation to whether, the work arrangement will put an employee in breach of a work-related condition;

- a potential argument that the concept of 'intentional undue influence/ pressure' for the purpose of paragraph 245AAA(1)(a) necessarily requires knowledge that the degree of influence or pressure is 'undue';

- the presence of the word 'undue' might be taken to evince an intention that 'undue' influence or pressure must necessarily be constituted by something other than knowledge or recklessness in relation to the circumstances in which the intentional conduct occurs, otherwise there would be duplication in the elements of the offence as between paragraphs 245AAA(1)(a) and (c). That is, the result would be that influence or pressure cannot be proven to be 'undue' merely because the employer knows or is reckless that the proposed work arrangement they are actively trying to entice the employee to accept would breach the employee's work-related visa condition.

32. The Law Council notes that this issue may have arisen because subclauses 245AAA(1) and 245AAB(1) are dual civil and criminal penalty provisions by reason of subsections (2) and (4) of each provision. However, as noted, only the criminal offence provisions apply fault elements (see section 486ZF).

33. In reading clause 245AAA as a civil penalty provision, where it is immaterial whether the prospective employer had any knowledge of the risk of the arrangement breaching a work-related condition, the requirement that the prospective employer's pressure to accept the work arrangement as being 'undue' is material to whether the prospective employer's conduct is sufficiently untoward to merit sanction.

34. The issue raised in the preceding paragraphs could be addressed by separating clause 245AAA into separate civil and criminal penalty provisions.

35. Conversely, the term 'undue' arguably has more work to do in relation to the other new offence provision in subclause 245AAB(2).

36. In clause 245AAB, the work arrangement need not *itself* give rise to a breach of a visa condition. What matters for the offence is that the visa holder feels pressure to accept

or agree to the arrangement in order to *avoid* some other detriment – an adverse effect on their visa status or the non-satisfaction of a work requirement. In this way the *intention* to apply pressure on the visa holder and the *extent* of the pressure – factors which go to whether the pressure or influence is 'undue' – are arguably necessary aspects of the offence.

37. Indeed, there may be work arrangements which a visa holder believes they must accept in order to avoid an adverse effect on their immigration status or to satisfy a work-related visa requirement regarding which an employer is able to exert a proper or justified level of pressure or influence to accept. For example, work arrangements which themselves are necessary to maintain a person's immigration status or which themselves must be completed in order to satisfy a work-related visa requirement.

Recommendation

- **The Law Council recommends that consideration be given to whether the qualifier 'undue' is required or desirable in paragraph 245AAA(1)(a) as that paragraph applies in relation to the offence imposed by subsection 245AAA(2).**

Persons to whom the new work-related offences and penalty provisions apply

38. The new provisions, particularly as they operate as civil penalty provisions, could apply to persons other than employers.

39. This results from paragraph (b) of both subclause 245AAA(1) and subclause 245AAB(1), which provide that the work need not be carried out 'for' the person who exerted the coercion, influence or pressure – it could be carried out for that person *or* someone else.

40. The Explanatory Memorandum for the Bill suggests that these provisions are directed to 'employers, labour hire intermediaries and other persons in the employment chain'.[17] The phrase 'someone else' picks up circumstances in which, for example, the coercion or pressure is placed by the labour hire intermediary to accept work for a different employer.

41. However, there is nothing in the drafting of the Bill to confine the person who exerts coercion to be involved in the employment chain in the way suggested by the Bill; these clauses could feasibly apply to a family member, friend or acquaintance.

42. As discussed, as these clauses apply as civil penalty provisions, there is no fault element. This may mean that, strictly speaking, if a family member places undue pressure on a person to accept or agree to arrangement in relation to work, and as a result of the arrangement the person breaches a work-related condition, the person may fall foul of clause 245AAA.

43. The operation of these provisions could be clarified by, for example, amending paragraphs 245AAA(1)(a) and 245AAB(1)(a) to:

    - make clear that a person exerting coercion or applying the pressure or influence has some role in the employment chain; or

[17] Explanatory Memorandum, 2.

- draw some nexus between the worker and the person applying the coercion or pressure – perhaps some reference to the second person 'offering' the work or in some way being responsible for the offering or arranging the work.

44. It is noted that this is less likely to be an issue for the operation of these provisions as offences, because the fault element for paragraph (c) for each provision is knowledge or recklessness. In relation to clause 245AAA, for example, that family member or friend would need to know or be recklessness to the fact that there are reasonable grounds to believe that, if the person were to accept or agree to the arrangement, the person would breach a work-related condition.

Recommendation

- **Consideration be given to whether amendments are required to ensure the new prohibitions in clauses 245AAA and 245AAB only apply to persons in the employment chain.**

Prohibited employer declaration scheme

Content

45. Part 2 of the Bill will include provisions which will empower the Minister for Home Affairs to declare a person to be a prohibited employer (**prohibited employer declaration power**) for a period specified in the declaration.

Nature of the power to declare

46. The Minister may declare a person who has become subject to a *migrant worker sanction* to be a prohibited employer.[18]

47. A person is subject to a migrant worker sanction if:[19]

- The person is an approved sponsor subject to a bar imposed by the Minister under paragraphs 140M(1)(c) or (d) of the Migration Act.
    - Under those paragraphs, the Minister may (or must) bar a person from sponsoring a person under an existing approval or from applying for a new approval (respectively) for a specified period if reasonably satisfied that the approved sponsor has failed to satisfy a sponsorship obligation.
- The person is convicted of a work-related offence or is subject to a civil penalty order for contravention of a work-related provision under the Migration Act.
- The person is subject of an order *Fair Work Act 2009* (Cth) (**Fair Work Act**) for contravention of a specified civil remedy provision[20] in relation to an employee who is a non-citizen.

48. The declaration must be made within five years of the person being first subject to the migrant worker sanction.[21]

[18] Subclause 245AYG(1).
[19] Clause 245AYD.
[20] See clause 245AYE.
[21] Subclause 245AYE(2).

49. The Bill provides a scheme for providing natural justice to a person who may be subject to the declaration power, which is to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the power.[22]

50. Under that mandatory scheme:

- the Minister must send a written notice to the purpose stating that the Minister proposes to make such a declaration and the reasons for it, and invite a submission setting out reasons why the Minister should not make the declaration within 28 days, or a longer period specified in the notice;[23]
- in making a decision, the Minister must consider any submission made by the affected person and any criteria prescribed in the regulations;[24] and
- the Minister must give a copy of a declaration to a prohibited employer as soon as possible, which comes into effect the day after the declaration is given to the person or a later day specified in the declaration.[25]

51. The Bill does not provide any guidance or impose any requirements as to the length of time a declaration may have effect – the Minister may set a period for as long or as short as he or she deems fit. A person is a 'prohibited employer' while the declaration remains in force.[26]

Consequence of being a prohibited employer

52. A prohibited employer must not either allow a non-citizen to work, or have a material role in a decision made by a body corporate to allow a non-citizen to begin work, if that non-citizen either does not hold a visa or holds a visa other than a permanent visa, unless the work is 'merely incidental' to the business.[27]

53. Further, a person who was a prohibited employer who, in the 12 months starting on the day after the person ceased to be a prohibited employer, allows a non-citizen to begin work (other than a non-citizen who holds a permanent visa), must within 28 days give the Department certain information. That information includes the name of the non-citizen, a description of the work they are allowed to do, details of any work-related condition applying to the person, and any other information prescribed in the regulations.[28]

54. A person who contravenes those requirements is liable to a civil penalty.[29]

55. The Minister must publish information about prohibited employers on the Department's website, including identifying information, a brief summary of the migrant worker sanction that is the basis of the person's declaration, and the period of the declaration.[30]

[22] Clause 245AYK.
[23] Subclauses 245AYG(4) and (5).
[24] Subclause 245AYG(6).
[25] Subclauses 245AYG(7) and (8).
[26] Clause 245AYB.
[27] Clause 245AYH.
[28] Clause 245AYJ.
[29] Subclause 245AYH(3).
[30] Clause 245AYI.

Application

56. The prohibited employer declaration power will be able to be exercised in relation to migrant worker sanctions to which a person becomes subject on or after the commencement of Schedule 1, whether the conduct leading to the sanction occurs before, on or after the commencement of this Schedule.

Context

57. The Explanatory Memorandum for the Bill suggests that this measure 'responds holistically to the issues and concerns that underpin Recommendation 20 of the Taskforce Report'.[31]

58. Recommendation 20 of the Taskforce Report states:

> *It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.*

59. Recommendation of the Taskforce Report was drawn from New Zealand law. The Taskforce Report describes this New Zealand scheme as follows:[32]

> *Under the new measures, the New Zealand Labour Inspectorate can provide the Immigration New Zealand agency with a list of non-compliant employers who have been issued a penalty for breach of employment standards. These employers then face a set stand-down period, preventing them from recruiting migrant workers in a sponsored arrangement for a specified period, depending on the severity of the breach.*

60. Later in the Taskforce Report, it is stated that:[33]

> *… more consideration needs to be given to the possibility of a New Zealand style banning scheme covering the employment of temporary migrant workers. This would impose sanctions on employers engaging migrant workers if the employers were found to have engaged in wage exploitation practices against migrant workers. It should desirably go beyond the New Zealand scheme in covering employers of non-sponsored as well as of sponsored migrant workers.*

61. Although not specified in the Taskforce Report, it appears the New Zealand law in question is the immigration instructions (**NZ immigration instructions**) made by the Minister (for the purposes of that Act) under section 22 of the *Immigration Act 2009* (NZ).

62. Specifically, under the NZ immigration instructions, an employer who supports a visa application or provides an offer of employment in support of an application must have a history of compliance with employment law.[34]

63. Employers are considered to not have a history of compliance with employment law if they are included on a list of non-compliant employers maintained by the Labour Inspectorate. The rules for inclusion on the list are set out in Appendix 10 of the New Zealand immigration instructions.[35]

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[31] Explanatory Memorandum, 96.
[32] Professor Allan Fels AO and Professor David Cousins AM, n 2, 121
[33] Ibid, 124
[34] R5.110 of the Immigration New Zealand (INZ) Operational Manual, < https://www.immigration.govt.nz/opsmanual/#64549.htm>.
[35] Ibid, Appendix 10, https://www.immigration.govt.nz/opsmanual/#64502.htm.

64. Appendix 10 provides that an employer is non-compliant when they have been subject to a particular enforcement action and prescribes the period of time they are stood-down for each kind of action, with the lengthiest stand-down period 24 months. The enforcement actions set out in Appendix 10 range from infringement notices issued by a labour inspector to penalty ordered by the Employment Court.

Headline comments

65. The Law Council generally welcomes the introduction of the prohibited employer declaration scheme.

66. It is evident from the discussion above that the prohibited employer declaration power applies more broadly than Recommendation 20, as it includes persons subject to a number of civil penalty provisions, in addition to persons convicted by a court. However, the Law Council agrees with the use of civil penalty provisions in general, and given this, the Law Council considers it reasonable for the prohibited employer declaration power to apply to the employers subject to work-related civil penalty provisions to ensure that the prohibited employer declaration scheme meets its objective. As discussed, this is also consistent with the New Zealand scheme upon which it is based.

67. The proposed scheme will, as recommended by the Taskforce Report, go further than the New Zealand law and apply to employers of temporary non-sponsored visa holders, in addition to employers of sponsored workers. The Law Council supports this approach – the agriculture, hospitality, and retail industries rely heavily on non-sponsored visa holders, and this will be an incentive for them to address their non-compliance. The Law Council anticipates that this will be a challenge to regulate and suggests the Department consider compliance tools to monitor prohibited employers, beyond the publication of their details.

68. Having said this, the Law Council considers that there are a number of improvements which could be made to this scheme.

Analysis

The scope of the Minister's prohibited declaration power

69. The Law Council supports the inclusion of a discretionary power to declare a person to be a prohibited employer to enable the circumstances surrounding the contravention to be considered. However, the Law Council considers the Bill would be improved by:

- confining the power to decide whether to make a prohibited declaration through criteria or a statutory test imposed by primary legislation; and
- limiting the period of time for which a prohibited employer declaration can be made.

The scope of the discretion

70. Under the proposed amendments, the Migration Act would not set out any criteria which apply to the Minister's decision whether to make a prohibited employer declaration. Under the amendments, the Minister would instead be obliged to consider 'any criteria' prescribed by the regulations.

71. The Law Council considers it to be preferable for the Migration Act itself to impose criteria or a statutory test which circumscribes the power of the Minister to make a declaration. There are several reasons for this.

72. Firstly, it will provide guidance to both the Minister and to the public, including a person given a notice that the Minister intends to make a prohibited declaration in relation to them, as to how to a particular migrant worker sanction bears on the power to make a prohibited employer declaration.

73. Under the New Zealand scheme referred to above, the rules mandate the exclusion period for a worker depending on the kind of sanction to which they have been subject – with longer exclusion periods applying in relation to more serious sanctions. However, the existence of a discretionary power to make a prohibited declaration power in the proposed by the Bill suggests that there may be occasions where the Minister may reasonably decide *not* to make a prohibited employer declaration in relation to a person subject to a migrant worker sanction.

74. The Law Council considers that it would assist the Minister to make consistent and accountable decisions, and a person subject to the power to provide a meaningful response to a natural justice letter, if the Migration Act itself set out criteria or mandatory considerations for the declaration of the prohibited declaration power, which assist to make clear when it may be reasonable or not to make a prohibited employer declaration in relation to a person subject to a migrant worker sanction.

75. The Law Council does not consider including a power to prescribe the criteria by way of regulations in the Bill to be sufficient.

76. The Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**) has published guidelines which set out that committee's expectations regarding the scope of the five scrutiny principles set out under Senate standing order 24(1)(a), including principle (iv): whether a Bill inappropriately delegates legislative powers.[36]

77. It is worth extracting the guideline in relation to principle (iv) in full:

> *A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. Significant matters should therefore generally be included in primary legislation, which is subject to a greater level of parliamentary oversight.*
>
> *Significant matters include provisions setting out significant elements of a regulatory scheme and provisions that have a significant impact on personal rights and liberties, such as coercive or intrusive powers. The committee's scrutiny concerns will also be heightened where significant matters are included in delegated legislation that is not subject to disallowance.*
>
> *Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:*
>
> - *why it is appropriate to include significant matters in delegated legislation; and*
> - *whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation.*

[36] Australian Senate, Senate Standing Committee for the Scrutiny of Bills, 'principle (iv): whether a Bill inappropriately delegates legislative powers', <link>.

> *The committee has generally not accepted a desire for administrative flexibility, or consistency with previous arrangements to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.*

78. It is noted that the Scrutiny of Bills Committee did not mention this discretionary power in its scrutiny report about this Bill.[37] However, the Law Council considers this guideline extracted in the previous paragraph supports the criteria for the prohibited employer declaration power being included in the primary legislation.

79. The criteria for a power to declare a person to be a prohibited employer is a 'significant element of a regulatory scheme' – it limits the scope of a power the Minister essentially has to prohibit a person from employing temporary migrants. The effect of a prohibited employer declaration on a person may be significant, as it could directly affect their livelihood.

80. There is no guidance on the face of the legislation to limit the regulations which may be prescribed for the purposes of this provision – the power in the Bill to prescribe such criteria is confined only by the general principle that the regulations be consistent with the Act.[38] Under Law Council policy, it is a principle of the rule of law that the scope of that delegated authority should be carefully confined.[39]

81. The criteria which may be prescribed under this power are addressed in the body of the Explanatory Memorandum and in the statement of compatibility with human rights which is set out at Attachment A to the Explanatory Memorandum. Interestingly, these explanations are divergent.

82. In the body of the Explanatory Memorandum, it is stated that:[40]

> *Without limiting the criteria that may be prescribed, such criteria might relate to matters such as:*
>
> - *the potential impact on the viability of the person's business if declared a prohibited employer, particularly in relation to the person's capacity to attract and recruit new employees while subject to the prohibition under new subsection 245AYH;*
> - *the seriousness of the offence or contravention leading to the person being the subject of the* ***migrant worker sanction*** *(including consideration of any aggravating factors*).

83. In the statement of compatibility with human rights it is stated that:[41]

> *The Regulations may include consideration of:*
>
> - *past and present conduct of the employer in their engagement with the Department*
> - *the employer's history of non-compliance and whether the non-compliance is recurring*
> - *the nature and seriousness of the breach*
> - *the impact on the migrant worker*

[37] Australian Senate, Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 18 of 2021, 18-20.
[38] Subsection 504(1) of the Minister Act.
[39] Law Council of Australia, Policy Statement – Rule of Law Principles, Principle 6a, < https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.
[40] Explanatory Memorandum, [161].
[41] Ibid, 98-99.

- *any extenuating circumstances outlined by the employer, including the impact the prohibition would have on the ongoing viability of the business and how that might impact existing workers and the broader community.*

It is intended that the prohibition will be used to address only the most serious breaches.

84. As a matter of law, statements about how it is intended that the Governor-General will exercise a delegated power made in an Explanatory Memorandum hold no weight with respect to how the power may be validly exercised. However, the Law Council considers that these different descriptions of the regulations which the Minister may recommend the Governor-General make under this power further make the case for time being taken now to draft criteria for inclusion in the Bill passed by Parliament.

85. This is particularly the case if the intent is that the prohibited employer declaration power only be exercised 'to address only the most serious breaches', as suggested in the Explanatory Memorandum. There is nothing on the face of the legislation which gives effect to that intent, and the Law Council submits that Parliament should have an opportunity to consider whether that intent is appropriate, and if so, oversee amendments which will provide for that intent to be given effect.

86. The case for further circumscribing this power is further made by the change to the Bill from the Exposure Draft to require a prohibited employer declaration to be made within five years of the person being first subject to the migrant worker sanction. The Exposure Draft simply required the person to, at that time, be subject to a migrant worker sanction.

87. This change permits the declaration to be made in relation to a person for whom the relevant migrant worker sanction (such as a sponsorship bar) no longer applies. This is made clear by the addition of the phrase 'or was' to the paragraphs in subclause 245AYA(2), which is a change from the Exposure Draft.

88. The Law Council understands the logic of this change, as without a specific timeframe within which a prohibited employer declaration may be made applied by reference to the date of the sanction, there may be some doubt as to whether a person is still subject to the sanction. Take the example of a person convicted of an offence: if, per the Exposure Draft, the requirement was that a person 'is convicted' of an offence in order to be subject to a prohibited employer declaration there may be a question as to when a person could still said to be (or may stop being) 'convicted'.

89. There is a risk, however, that allowing the Minister to base his or her decision on such a wide range of provisions in the Fair Work Act (for example) and for a period dating back as far as five years from the date the sanction was imposed, may lead to unintended consequences for employers who have remedied their non-compliance with the Fair Work Act. Perversely, it may also discourage employers from co-operating with a regulator such as the FWO, as doing so may result in a civil penalty which ultimately provides a basis for them to be subject to a prohibited employer declaration and not be able to employ new persons to their business.

90. As such, to address these issues, the Law Council suggests that the Bill be amended so that the prohibited employer declaration power is subject to at least the following mandatory factors: period of time since the original sanction was imposed; co-operation with a regulator in relation to the original sanction; and the steps taken since the original sanction to remedy the conduct.

91. Separately, the Explanatory Memorandum suggests that providing a power for criteria to be prescribed in regulations 'ensures appropriate flexibility to review and adjust the

criteria from time to time, while also ensuring that there is appropriate parliamentary oversight, including through the Senate Standing Committee for the Scrutiny of Delegated Legislation'.[42] However, the Scrutiny of Bills Committee guideline provides that that 'committee has generally not accepted a desire for administrative flexibility … to be a sufficient justification, of itself, for leaving significant matters to delegated legislation'. If this flexibility is considered essential, it could be achieved by including a power to make regulations to *add to* criteria set out in the primary legislation.

92. Finally on this point, if a decision is made to retain the power to prescribe criteria relevant to the Minister's decision to make a prohibited employer declaration in regulations, the Law Council suggests any draft regulations to this end should also be subject to public consultation.

Recommendations

- **The Bill be amended so that the criteria relevant to the Minister's decision to make a prohibited employer declaration are prescribed in primary legislation. These may include those set out in the statement of compatibility with human rights in the Bill's Explanatory Memorandum and those suggested at paragraph 83 of this submission.**
- **If this recommendation is not accepted, in descending order of preference:**
  - **A power to make regulations be included *with* criteria imposed in the primary legislation;**
  - **The power to make regulations be confined by guidance in primary legislation as to the kinds of matters which may be prescribed;**
- **Whichever approach is taken, if it is intended that the prohibition will be used to address only the most serious breaches this should be made clear in the legislation.**

The period for which a declaration may be made

93. In addition, there is no statutory limit or even guidance on the length of period that a Minister could declare a person to be a prohibited employer. Further, the length of that period does not appear to be a matter capable of being constrained by any criteria prescribed in the regulations. Nor is there any period provided within which a declaration must be reviewed.

94. The Explanatory Memorandum states that the reason for this is that:[43]

> *This ensures that the Minister has the discretion to specify a period that the Minister considers proportionate to the nature and significance of the migrant worker sanction that gives rise to consideration of whether to declare the person to be a prohibited employer.*

95. There are a few points to make about this.

96. Firstly, if it is intended that the period of the prohibition should be 'proportionate to the nature and significance' of the migrant worker sanction, the Law Council submits the

[42] Ibid, [162].
[43] Ibid, [166].

Bill should expressly confine the Minister's power to set the period to be subject to this consideration to ensure this objective is given effect.

97. Secondly, an open discretion to impose a period of any length is inconsistent with the intent suggested in the statement of compatibility with human rights that the prohibition will only be used to address the most serious breaches. If only the most serious breaches should register *any* prohibition, then it would follow that the Minister should not have an unbound discretion to then make a declaration of any length.

98. Thirdly, some guidance in the legislation, whether it be through a proportionality test, a maximum limit, or both, would assist to ensure consistent and accountable decision-making. The length of time an employer is prevented from hiring a migrant worker is a significant aspect of the regulatory regime and it is appropriate for Parliament to form a view as to the maximum period of time this prohibition could be applied.

99. Finally, it may also assist the Administrative Appeals Tribunal, in reviewing an application which raises an issue about the length of a declaration, if there was some legislative guidance on this issue.

100. The Law Council considers statutory guidance about the length of time an employer may be subject to a prohibited employer declaration should be prescribed in the Bill itself.

Recommendation

- **The Bill be amended to limit the scope of the Minister's power to determine the length of time an employer may be subject to such a declaration. Ideally, this power would be limited by:**
  - **an express requirement that the the period of the prohibition should be proportionate to the nature and significance of the migrant worker sanction;**
  - **a maximum declaration period; and**
  - **a requirement to review the continuing appropriateness of a declaration after a certain period.**

Exhaustive statement of natural justice

101. The Law Council queries the necessity and appropriateness of imposing a procedural scheme which manifests an exhaustive statement of natural justice.

102. In its report on the Bill, the Scrutiny of Bills Committee stated:[44]

> *1.73 The committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle. The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. The committee considers that any attempt to abrogate or limit a person's fundamental right to natural justice should be thoroughly justified in a bill's explanatory memorandum, including an explanation as to why this level of flexibility would not adequately deal with situations where it would be impractical or inappropriate to grant a reasonable opportunity to be heard.*

[44] Australian Senate, Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 18 of 2021, [1.73].

103. That Committee went on to indicate that it did not consider that the Explanatory Memorandum had provided a sufficient explanation, and requested that explanation from the Minister, which is outstanding.[45]

104. The Law Council agrees with these views. The Law Council does not consider the case has been made to justify limiting the common law right to natural justice in this way. The right to natural justice allows for fairness and flexibility in administrative decision-making. A self-contained scheme may exclude some of the important procedural rights conferred by the common law depending on the circumstances of the case and the nature of the inquiry.

105. There are already several self-contained schemes for providing natural justice with respect to executive decision-making powers in the Migration Act. The Law Council raised misgivings about the codes of procedure which apply to decisions of the Administrative Appeals Tribunal in the Migration Act in a recent submission to the Committee regarding its inquiry into Australia's administrative review system.[46]

106. The Law Council indicated it considered that the repeal of the codes of procedure from the Migration Act would:[47]

- likely improve the quality of decision-making and the fairness of the review process for applicants, as decisions would be made subject to common law principles; and

- cease the large caseload of migration and refugee litigation, which is directed at the construction of, and compliance with, provisions forming part of the code of procedure.

107. The Law Council considers the same issues arise with respect to the scheme proposed in the Bill.

108. For example, the scheme provides for the Minister's natural justice notice to invite a person to provide a response within 28 days, unless another (longer) period is stated in the notice. There is no express facility for the person to request an extension of time or express power for the Minister to grant such an extension.

109. Ultimately, this may be resolved by the Minister exercising the power under subsection 33(3) of the *Acts Interpretation Act 1901 (Cth)* (**Acts Interpretation Act**) to amend the natural justice notice. However, given the scheme is taken to be an exhaustive statement of the requirements of the natural justice hearing rule, there may be a question as to whether that manifests a contrary intention, thus overriding the power in the Act Interpretation Act. Either way, this is a matter regarding which there is not clarity to a layperson.

110. Other examples of procedural aspects which appear to be missing from the scheme in the Bill include the absence of:

- a power to seek information from third parties relevant to the decision;

- a power or requirement to give reasons for a decision to make a declaration or not make a declaration;

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[45] Ibid, [1.76].
[46] Law Council of Australia, 'Performance and integrity of Australia's administrative review system', 7 December 2021, <link>.
[47] Ibid, [87].

- the absence of any process to seek a revocation of a declaration (despite the possibility of a revocation being expressly referred to in the Bill);[48] and

- a power or requirement to inform a person (including third parties consulted by the Minister) that the Minister has decided *not* to make a prohibited employer declaration.

Recommendation

- **The Bill be amended so that it no longer provides for a procedural scheme which is to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule.**
- **Whether or not this be done, consideration be given to amending the Bill to expressly address the procedural powers, processes and requirements referred to in the preceding paragraphs of this submission.**

Application and retrospectivity

111. As noted, item 11 of the Bill provides that the relevant migrant worker sanctions can relate to conduct that occurred before the commencement of these provisions, albeit in relation to sanctions imposed after commencement.

112. In relation to this, the Explanatory Memorandum states that:[49]

> This [approach] acknowledges the significant effect of the declaration, if made, but balances this against the fact that the ***migrant worker sanctions*** are well-established, and include long-standing offences and civil penalty or civil remedy provisions under the Migration Act and the Fair Work Act.

113. The Law Council has some misgivings about the new prohibited employer declaration power being able to be applied essentially as a result of conduct which predated the commencement of the provisions.

114. While it may be the case that there were provisions which prohibited that conduct at the time of the event, the prohibited employer declaration effectively imposes an additional consequence which did not exist at the time.

115. This conflicts with the general principle underpinning the Law Council's position on retrospective laws, which is that the law must be both readily known and available, and certain and clear to a person at the time of their actions.[50]

116. While the Law Council supports reasonable laws to ensure that workers are not placed in situations where they are exploited it queries whether the right balance has been struck in these provisions.

[48] Subclause 245AYG(9).
[49] Explanatory Memorandum, [207].
[50] Law Council of Australia, Policy Statement – Rule of Law Principles, Principle 6a, < https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

Recommendation

- **Amend the Bill to apply the prohibited employer declaration scheme only in relation to conduct which post-dates the commencement of the provisions making up the scheme.**

Publication of information

117. Proposed subclause 245AYF(6) provides that the Minister will not be required to arrange for the removal, from the Department's website, of information about a prohibited employer when the declaration period ends.

118. The Explanatory Memorandum relevantly states that:[51]

> *Relevantly, although the Minister is not required to arrange for the removal of this information, the intention is that such information would be removed from the Department's website as soon as reasonably practicable after the person stops being a prohibited employer.*

119. The Law Council cannot see any good reason why this intention to remove the information should not be assured by an obligation set out in the primary legislation.

120. Further, the Law Council suggests that the power to publish information should be subject to the requirement that the information published be true and accurate so far as reasonably practicable, and a person should be given the ability to ask for incorrect or outdated information to be removed.

Recommendation

- **The Bill be amended require the Minister to:**
  - **arrange for the removal of information about a prohibited employer as soon as reasonably practicable once the declaration ceases;**
  - **take reasonable steps to ensure the information published online is true and accurate, with a person able to ask for incorrect or outdated information to be removed.**

Providing clarity about the persons to whom the Bill applies

121. The prohibited employer scheme is stated to apply to 'persons', but appears to apply to natural persons and bodies corporate.

122. The Acts Interpretation Act provides that expressions used to denote persons generally, include a body corporate as well as an individual.[52] It also provides that express references in an Act to bodies corporate do not imply that expressions in that Act to a 'person' do not include bodies corporate.[53]

[51] Explanatory Memorandum, [187].
[52] Subsection 2C(1) of the Acts Interpretation Act.
[53] Ibid, subsection 2C(2).

123. The position in the Acts Interpretation Act will apply unless there is some contrary intention to be inferred from the text of the Bill itself.[54] The Law Council cannot identify a 'contrary intention'.

124. The Bill does not define 'person' for the purposes of the prohibited employer declaration power.

125. Some confusion is introduced by proposed subparagraph 245AYH(1)(b)(ii), which appears to distinguish a 'person' from a 'body corporate' by providing that a person who is a prohibited employer will contravene that clause if 'the person has a material role in a decision made by a body corporate to allow a non-citizen to begin work'. It would appear that subparagraph should be read as 'the person [who is a natural person] has a material role in a decision made by a body corporate to allow a non-citizen to begin work'. By contrast, it would seem that the reference to 'person' in subparagraph 245AYH(1)(b)(i) should capture both a natural person and a body corporate.

126. The Law Council considers it is appropriate that the prohibited employer scheme apply both to natural persons and bodies corporate. This is particularly the case given that to be liable to be declared a prohibited employer, a person must be subject to a migrant worker sanction, and several sanctions which come within the definition of a migrant worker sanction apply to bodies corporate as well as natural persons, including approved work sponsors subject to a bar by the Minister under paragraph 140M(1)(c) or (d) of the Migration Act.[55]

127. However, the Law Council suggests the Bill be amended to make it abundantly clear that a 'person' for the purpose of the prohibited employer scheme may be either a natural person or a body corporate.

Recommendation

- **Part 3 of Schedule 1 to the Bill be amended to make explicit that it the reference to 'person' applies to natural persons and bodies corporate, particularly in clause 245AYH.**

The 'domestic context' and 'merely incidental' exceptions

The domestic context exception

128. The Bill prohibits a prohibited employer from allowing a non-citizen to work, with 'allows' to work defined for the purpose of Subdivision E of Division 12 of Part 2 to include a person 'engages a non-citizen, other than in a domestic context, under a contract for services'.[56]

129. The proposed definition of 'allows' to work is identical to paragraphs 245AG(2)(a) and (b) of the Migration Act, which defines the circumstances in which someone may 'allow' a non-citizen to work for the purposes of the offence and civil penalty provisions which apply in relation to a person allowing an unlawful non-citizen to work or for a person to work in breach of a work-related condition.

[54] Ibid, subsection 2(2).
[55] An approved sponsor may be a body corporate – see, for example, reg 2.84 of the Migration Regulations 1994 (Cth).
[56] Subclause 245AYC(2).

130. The term 'domestic context' is not defined – either presently in the Migration Act in relation to the use of that term in the paragraph 245AG(2)(a), nor in the proposed Bill.

131. Paragraph 245AG(2)(a) was inserted by the *Migration Amendment (Employer Sanctions) Act 2007* (Cth). The Explanatory Memorandum for the Migration Amendment (Employer Sanctions) Bill 2006 (Cth) explains the reason for the exclusion of that term as follows:

> *98. This paragraph intentionally excludes contracts in a domestic context. The amendments are not intended to require householders to make inquiries before engaging the services of contractors at their homes, such as plumbers, electricians or cleaners.*
>
> *99. This paragraph is not intended to exclude general domestic activities in a commercial context. This Subdivision is intended to apply to people who engage cleaners as independent contractors as part of a cleaning business. The amendments are not intended to capture householders who may use the services of that business.*
>
> *100. Persons who engage independent contractors in a domestic context are excluded because of the short term basis of the relationship (unlike employment) and the limited capacity of householders to check the work entitlements of non-citizens.*

132. The term is used in section 245AG in the context of offences which apply when a person *allows* a person to work who is not permitted to work unless (in either case) the employer takes steps to verify the person is permitted to work. The exclusion of work performed in a domestic (ie, household) context from that is directed towards ensuring that a householder does not need to ascertain a worker's personal details and check the Department's online database to verify a person's immigration status.

133. Proposed paragraph 245AYC(2)(b) of the proposed Bill is directed at different conduct. It does not capture households across Australia – it is directed only at persons already declared to be prohibited employer.

134. The Law Council suggests the Committee give thought to whether it is appropriate to permit prohibited employers (which it is noted, appears to include bodies corporate) to allow non-citizens to work in a domestic context. The Law Council notes the identified prevalence of forced labour in domestic work settings in Australia.[57] Given the strong efforts which have been adopted to address forced labour and modern slavery under the Australian Government's modern slavery agenda, including in domestic settings, this may have an undermining effect.

The merely incidental exception

135. Subclause 245AYH(2) provides that the prohibition on a prohibited employer allowing (or having a material role in a decision to allow) a non-citizen who does not hold a visa or holds a visa other than a permanent visa, 'does not apply in relation to work that the non-citizen is allowed to do if the work is merely incidental to a business of the person or the body corporate'.

136. Read strictly, that provision suggests that it would not be prohibited for a prohibited employer to allow a non-citizen who does not hold a visa to do work which is merely incidental to the business. The Law Council questions whether it should be

[57] Global Slavery Index, *Country Studies – Australia*, https://www.globalslaveryindex.org/2018/findings/country-studies/australia/.

permissible for a prohibited employer to allow a non-citizen who does not hold a visa to do any work for the business, even if incidental to the business.

137. Arguably, this is inconsistent with section 245AB of the Migration Act which prohibits a person from allowing an unlawful non-citizen to work and is not subject to exception when that other work is 'merely incidental' to the person's business.

Comment about both exceptions

138. The Law Council acknowledges that the issues raised in relation to both exceptions – to provide that a prohibited employer must not engage a non-citizen in a domestic context or a non-citizen who does not have a visa to perform work which is 'merely incidental' to their business – would place a burden on prohibited employers to make enquiries of a potential worker's visa status to do work which is not related to the prohibited employer's business. This may be onerous. However, the issue is raised for consideration by the Committee.

Recommendation

- **The Law Council recommends that consideration be given to amend the Bill to provide that a prohibited employer should be not permitted to:**
  - **engage a non-citizen in a domestic context;**
  - **allow a non-citizen who does not have a visa to perform work which is 'merely incidental' to their business.**

Consideration should be given to the impact on workers

139. The Law Council suggests consideration be given to the flow-on impact of a person being declared a prohibited employer to the employer's business and its workers and how any detrimental impact may be mitigated.

140. In relation to the general workforce, if there is a need to employ further workers to meet the needs of the business, the inability to do this in circumstances where the available workforce consists of mainly migrant workers will likely impact the existing workers if the employer is unable to maintain their business.

141. There may also be detrimental impacts on individual workers.

142. For example, a person declared a 'prohibited employer' who is hiring Temporary Skills Shortage (subclass 482) or Temporary Work (subclass 457) visa holders may be unable to sponsor new applicants through the Employer Nomination Scheme in due course, either because of a ban period or because the fact of being declared a 'prohibited employer' with civil penalty provisions attached is found to be 'adverse information' that is not reasonable to disregard under regulation 5.19 of the Migration Regulations 1994 (Cth) (**Migration Regulations**).

143. This may result in employees being even less likely than now to come forward to report underpayment or exploitation when on a temporary residence transition pathway under the Employer Nomination Scheme. This is because if they do, it may make it more difficult to be able to access permanent residence via that employer and may struggle to even qualify for a further onshore temporary visa. Further, for some workers, for example when they are too close to the age limit, it may be difficult for them start afresh with another employer. This would create tangible and unfair

outcomes for visa holders who lose their access to permanent residence through the fault of their employer.

144. Take, for example, a visa holder who works for four years on a subclass 457 visa for a sponsor who is then sanctioned for not keeping records, for failing to employ the person in the nominated occupation and for underpaying the person in respect of the nominated salary and is declared a prohibited employer, and for whom as a result is unable to be kept on by the employer.

145. That person:

    a. Has arguably breached visa condition 8107(a) because they have ceased to be employed by the employer in relation to which the visa was granted and may have an issue demonstrating that they substantially complied with the visa conditions of their subclass 457 visa in a subsequent temporary visa application;

    b. has lost their pathway to permanent residence via the Temporary Residence Transition and Employer Nomination Scheme;

    c. has no immediate option to remain in Australia unless the person can immediately find a new employer willing to sponsor him or her;

    d. may be unable to obtain a skills assessment in their chosen occupation or demonstrate that he has any work experience in the nominated occupation given the adverse findings of the Department and thus be unable to qualify for a subclass 482 visa.

146. Unless proper consideration is given to how to overcome the reticence of that person to come forward to cooperate with the authorities, through considered changes to the Migration Regulations, the above detriments may result in the person not reporting that misconduct.

147. To address this issue, the Law Council suggests that consideration be given to introducing a new visa type to support migrants to leave exploitative situations quickly and remain in Australia on a skilled visa. The Migrant Exploitation Protection visa introduced in New Zealand from 1 July 2021[58] may provide a model on which a new Australian visa could be based.

148. A person is eligible for a New Zealand Migrant Exploitation Protection visa if, relevantly, they hold a work visa that specifies their employer as a condition of their visa[59] and they lodge an application for the visa within one month[60] of making a report of exploitation to the Ministry of Business, Innovation and Employment, which has assessed the report is credible that workplace exploitation may have occurred.[61]

149. A New Zealand Migrant Exploitation Protection visa will be granted for the shorter of six months of the duration remaining on the applicant's current work visa,[62] and will allow a person to be employed by any New Zealand employer.[63]

[58] New Zealand Ministry of Business, Innovation and Employment, 'Addressing temporary migrant worker exploitation' (webpage), https://www.mbie.govt.nz/immigration-and-tourism/immigration/temporary-migrant-worker-exploitation-review/, accessed on 25 January 2022.
[59] New Zealand Immigration Instructions, subparagraph WI20.5(a)(ii).
[60] Ibid, subparagraph WI20.15(a)(iii).
[61] Ibid, subparagraph WI20.15(a)(ii).
[62] Ibid, paragraph WI20.20(a).
[63] Ibid, paragraph WI20.20(b).

150. A visa akin to the New Zealand Migrant Exploitation Protection visa may directly address the issue of migrants being reluctant to come forward to report employer misconduct out of a concern that the report will adversely affect their visa status.

Recommendation

- **The Law Council recommends consideration be given to:**
  - **introducing a new migrant exploitation visa, similar to the New Zealand Migrant Exploitation Protection visa, to support migrants to leave exploitative situations quickly and remain in Australia on a skilled visa; and**
  - **any necessary amendments to the Migration Regulations and under policy to mitigate any detrimental effects of a prohibited employer declaration on migrant workers.**

VEVO provisions

Content

Adjustment to existing defences

151. The Bill will adjust the existing defences to the offence and civil penalty provisions relating to a person who refers or allows a person to work unlawfully, which apply when a person has made enquiries about a person's visa status.

152. Specifically, the current prohibitions on a person allowing or referring an unlawful non-citizen to work, or allowing or referring a non-citizen to work in breach of work-related condition do not apply if the person:[64]

> *takes reasonable steps at reasonable times to verify that the worker is [not an unlawful non-citizen/ not in breach of the work-related condition solely because of doing the work], including (but not limited to) either of the following steps:*
>
> *(a) using a computer system prescribed by the regulations to verify that matter;*
>
> *(b) doing any one or more things prescribed by the regulations.*

153. For paragraph (a), the 'computer system operated by the Department, and known as "Visa Entitlement Verification Online", or 'VEVO"' is prescribed.[65]

154. For paragraph (b), both 'entry into a contract under which a party to the contract … [verifies] that a person has the required permission to work in Australia' or inspection of certain documents are prescribed.[66]

155. That provision will be repealed and replaced with a provision which will provide those offences will not apply if the person:

[64] Subsections 245AB(2), 245AC(2), 245AE, and 245AEA(2) of the Migration Act.
[65] Regs 5.19G(1), 5.19H(1), 5.19J(1), 5.19K(1) of the Migration Regulations.
[66] Ibid, regs 5.19G(2), 5.19H(2), 5.19J(2), and 5.19K(2).

is, and continues to be, reasonably satisfied that the worker is [not an unlawful non-citizen/ not in breach of the work-related condition solely because of doing the work] on the basis of information obtained:

(a) by logging into and using the prescribed computer system to source the information; or

(b) unless the first person is a required system user—under an arrangement by which another person logs into and uses the prescribed computer system to source the information; or

(c) by doing any one or more of the things prescribed by the regulations.

156. The only change made by that amendment is to permit an arrangement to be made to enable a third person to check the prescribed computer system unless they are a required system user. A person is a required system user if, either:

- they ceased to be a prohibited employer within the previous 12 months;
- they are in a class of people determined in a legislative instrument by the Minister because the Minister is satisfied it is 'reasonably necessary to enhance the use of the prescribed computer system';
- they are declared by the Minister to be such a user because the Minister is satisfied that making the declaration is 'reasonably necessary to help ensure that the person uses only information sourced from the prescribed computer system'.

157. According to the Explanatory Memorandum:

- the determination by class is expected to be made 'in circumstances where the Department or the ABF [Australian Border Force] identify systemic issues or trends of concern in a particular industry in relation to allowing or referring non-citizens for work without the *required permission*', such that it is a 'necessary and proportionate response to require members of the industry to use the prescribed system directly', rather than rely on third parties;[67]
- the declaration in relation to a particular person may be made, for example, when 'particular person has a history of non-compliance with the requirements'.[68]

New civil penalty provisions

158. In addition, the Bill will provide for civil penalties for prohibited conduct in which a person allows or refers a non-citizen for work without determining whether the non-citizen has the *required permission to work* by using information from a prescribed computer system.

Alternative means to obtain information

159. In addition, the Bill will empower regulations to prescribe ways in which information may be obtained if information cannot be sourced for the purposes of any of these civil penalty provisions by logging into and using the prescribed computer system, due to circumstances beyond the reasonable control of the person seeking to log into and use the system.[69]

[67] Explanatory Memorandum, [304].
[68] Ibid, [307].
[69] Clause 245APA.

Headline comments

160. The Law Council generally supports the establishment of civil penalty provisions to require a person to use the VEVO system to determine whether a non-citizen is lawful and has the necessary permission to work.

161. The Law Council supports the amendment made to the Exposure Draft to re-instate what is now paragraph (c) of subclauses 245AB(2), 245AC(2), 245AE(2) and 245AEA(2), which appears to have taken into account the points made in Law Council submission to the Department that VEVO does not provide the information required by these provisions in all circumstances.[70]

162. The Law Council considers that the current flexibility in reg 5.19G of the Migration Regulations (the regulations prescribed under the present clauses) should be able to be relied on, but consideration be given to explicitly including some flexibility to obtain the information from other sources. There are many people in the community who do not have a birth certificate or an Australian Passport (including Aboriginal and Torres Strait Islander People with unregistered births) and who will therefore be unable to produce the documents listed.

163. 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 – the Law Council suggests these regulations be subject to public consultation.

164. In addition, the Law Council makes the following comments about the proposed amendments to the defences to the existing offences.

165. Firstly, the Law Council recommends modification to proposed subsections 245AB(2) and 245AC(2) to remove obligation for approved sponsors to undertake *ongoing* VEVO system checks for sponsored employees, such as Subclass 482 or 457 visa holders, because they are already sponsored by the employer. There is no reasonable prospect of a such an employee becoming an unlawful non-citizen while that sponsorship is on foot.

166. Secondly, the Law Council recommends that an employer's obligation to check VEVO should be able to be satisfied if that check is undertaken on their behalf by a lawyer or registered migration agent. Proposed subclauses 245AB(2) and 245AC(2) enable the employer's obligation to check VEVO to be satisfied 'unless the first person [the employer] is a required system user—under an arrangement by which another person logs into and uses the prescribed computer system to source the information'. It is not clear whether such 'an arrangement' would cover a lawyer-client relationship. Further, even if it did, it is not clear why a lawyer could not perform this task for an employer who is a 'required system user', which includes persons who have been a prohibited employer in the last 12 months.

167. Thirdly, currently (and appropriately) a person is unable to use VEVO to make an inquiry about a person without that person's permission.[71] It is not clear on the face of the legislation how such a such a situation would apply in relation to the requirements that VEVO be used to check a person's migration status. This may be

[70] Law Council of Australia, 'Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021', <link>, 24 August 2021, [139]-[141].
[71] See cl 2c of 'User Access', Terms and Conditions of VEVO Use By Organisations - Inquiry Stage, < https://immi.homeaffairs.gov.au/help-text/migration/Pages/terms-conditions/vevo-3rd-party-logon-tc.aspx, accessed 19 August 2021.

a matter which the Department considers proposing being included in regulations made under clause 245APA.

168. Fourthly, the Committee may wish to seek clarity from the Department as to how these provisions will be enforced and in particular, whether any updates to information about the use of site visit data need be made. Currently, the Terms and Conditions of VEVO Use By Organisations - Inquiry Stage states, under the heading 'Site visa data', that:

> 2. *When visiting the Website, a record of your visit will be logged. Information is recorded for statistical purposes and is used by the Commonwealth to monitor the use of the Website, discover what information is most and least used and to make the Website more useful where possible.*
>
> …
>
> 4. *This information may be used in the event of an investigation into apparent improper use of the Commonwealth's VEVO facility, or where a law enforcement agency exercises a warrant to inspect the Internet Service Provider's logs.*

169. This information does not currently cover compliance and enforcement purposes.

Recommendation

- **The Law Council suggests consideration be given to amending Part 3 of Schedule 1 to the Bill to address the several matters identified above.**

Introduction of enforceable undertakings and compliance notices

Content

Enforceable undertakings

170. Part 5 of Schedule 1 to the Bill provides that work-related offences and work-related provisions are enforceable by way of enforceable undertakings under the powers in Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**RPA**).

171. Under Part 6 of the RPA, an authorised person may accept undertakings by a person that the person will, in order to comply with one of those provisions or to ensure the person does not contravene such a provision in the future, take specified actions or refrain from taking specified actions.[72] These undertakings are enforceable by court order.[73]

Compliance notices

172. Part 6 of Schedule 1 to the Bill provides that an authorised officer may give a person a notice specifying action that the person must take, or must refrain from taking, to address conduct which constitutes or would constitute a work-related offence; or a

[72] Section 114 of the RPA.
[73] Ibid, section 115.

contravention of a work-related provision.[74] Failure to comply with a compliance notice is a civil penalty provision.[75]

Comment

Headline view

173. The Law Council approves of the use of these flexible compliance tools to be used in low level offending, as a means to give effect to compliant conduct as well as to simply punish.

174. The Law Council notes that the Taskforce Report recommended the introduction of enforceable undertakings into Fair Work Act and welcomes the Department taking the proactive approach of also applying them to its work-related regulatory scheme in the Migration Act.

175. In addition to the examples set out in the Explanatory Memorandum,[76] the Law Council considers enforceable undertakings and compliance notices may be useful in circumstances where a natural person is a prohibited employer working, for example, in a business involved in the employment chain. The Bill requires that person not to have a 'material role in a decision made by a body corporate to allow a non-citizen to begin work'[77] – an enforceable undertaking about how the person will be able to manage their work to avoid falling foul of that requirement, or a compliance notice to direct a person to take action to avoid having such a material role, may assist to ensure compliance with what may otherwise be a difficult provision to enforce.

Retrospective operation

176. Item 40 of Schedule 1 provides that the compliance notice scheme introduced by Part 6 will apply in relation to conduct (including an omission) occurring before, on or after the commencement of that Schedule.

177. By way of explanation for this scheme applying to conduct occurring before the commencement of Schedule 1, the Explanatory Memorandum states:

> *497. The introduction of compliance notices as an additional compliance tool to deal with conduct constituting a work-related offence or a contravention of a work-related provision is intended to provide an alternative to court proceedings, in an effort to encourage greater compliance by employers. Aside from the new work-related offences and civil penalty provisions introduced in this Bill, the work-related offences and work-related provisions in Subdivision C of Division 12 of Part 2 of the Migration Act are long-standing, well-established provisions.*
>
> *498. There is limited excuse for employers, labour hire intermediaries and other parties involved in the employment of non-citizens to be unaware of these existing provisions. The establishment of the Migrant Workers' Taskforce was preceded by a significant number of high-profile cases revealing exploitation of migrant workers to a concerning level. These cases were highlighted by government investigations, public inquiries and media reports. Among other things, these cases exposed unacceptable gaps in Australia's legal system designed to treat all workers equally, regardless of their visa status.*

[74] Subclauses 245ALB(1) and (2).
[75] Subclause 245ALB(5).
[76] [441] (enforceable undertakings) and [472] (compliance notices).
[77] Subparagraph 245AHY(1)(b)(ii).

> *499. The Taskforce was set the specific task to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify cases of migrant worker exploitation.*
>
> *500. The introduction of compliance notices as an additional legislative tool under the Migration Act, to deal with non-compliance with work-related provisions under the Migration Act, is consistent with this approach. Compliance notices provide a legislative basis and framework for the ABF to promote compliance by employers, labour hire intermediaries and other persons with the work-related provisions of the Migration Act.*
>
> *501. The application of the amendments to the Migration Act by this Part to conduct (including an omission) occurring before, on or after the commencement of the Schedule ensures that the ABF has the necessary tools to deal effectively with existing, and in some cases intractable, non-compliance with provisions of the Migration Act that are intended to protect migrant workers, as well as Australia's reputation as a destination of choice.*

178. As previously stated, the Law Council's view is that laws imposing additional obligations and consequences should be prospective unless appropriately justified.

179. In this case, it is noted that the retrospective application of this scheme would have the advantage that conduct in breach of existing offences and civil penalties are dealt with in a manner that is less onerous than through the use of other compliance management tools.

180. However, it appears both from item 40 and the description in the Explanatory Memorandum that the compliance notice scheme will capture new offences introduced by the Bill in relation to conduct which occurred before the commencement of the Bill. The Explanatory Memorandum does not appear to provide sufficient explanation for a retrospective approach in those circumstances, and the Law Council suggests an amendment to item 40 to provide that it does not apply to conduct occurring before the commencement of the new offences and civil penalty provisions.

Recommendation

- **The Law Council recommends that the Department provide a more detailed justification for making Part 6 retrospective in relation to the new offences and civil penalty provisions. If the approach is not expected to operate beneficially, the Part should not operate retrospectively**.

Practical matters

Increased enforcement efforts are required

181. The Law Council has received feedback from practitioners and its constituent bodies that while additional offences and increased penalties are important, increased investment and appetite for meaningful enforcement action in relation to the laws which already exist is required to achieve the public policy goals of reducing exploitation and abuse of temporary visa holders.

182. The feedback is that existing offences directed at protecting migrant workers are not being enforced, and the new offences will have much greater impact if enforcement efforts are increased.

183. Information provided by the Department under the *Freedom of Information Act 1982* (Cth)[78] suggests that there were three investigations conducted in relation to the offence and civil penalty provisions in relation to work by non-citizens and sponsored visas in Subdivisions C and D of Part 12 of the of the Migration Act in 2019-2020 and 2020-2021: two were terminated and one resulted in an infringement notice.

184. Anecdotally, the Law Council is not aware of any criminal proceedings commenced by the Department in relation to the existing offences. The Law Council understands that the most likely outcome for an initial contravention is an 'Illegal Worker Warning Notice' (**IWWN**) as the Department generally prefers to educate, rather than sanction, first-time offenders. It understands that an Infringement Notice will be issued if further breaches occur, the amount of which depends on the severity of the breach and the organisation's history of engaging workers who do not hold a visa.

185. The Law Council understands that issuing of any of the above penalties (including an IWWN) usually leads to delays in visa processing and a request for further information issued seeking a response to why adverse information against the company is reasonable to disregard and should not prevent the grant of such visas.

Recommendation

- **The Law Council recommends that the Australian Government and relevant agencies, including the Department, increase investment in compliance and enforcement activities to ensure that the new and existing offences and civil penalties provide meaningful protection to migration workers.**

Greater support and resources for complainants

186. The Law Council has received feedback from several practitioners that further measures are required to encourage or facilitate visa holders coming forward to report exploitation before a person's visa is cancelled for a breach of work conditions, as to do so may cause immediate detriment to their visa status. As discussed, this may be exacerbated by the introduction of the prohibited employer scheme.

187. Further, practical suggestions to encourage complaints include making it easier and more cost effective for someone to pursue a claim for unpaid wages in the Federal Circuit and Family Court of Australia and funding for the legal assistance sector so that workers can be educated and empowered to pursue these rights. As claims are difficult to pursue, and take a long time to be determined, and a migrant worker is at risk of having to leave the country (or choose to do so) before their claim is determined.

188. The Law Council understands that the Federal Circuit and Family Court of Australia is currently largely reliant on the services of volunteer mediators in assisting to resolve small wage claims in the court. It has been reported to the Law Council that employees often have difficulty in accessing court forms and there is often considerable delay in the Court's ability to deal with matters.

[78] Freedom of Information Request FA 21/07/00914.

189. This issue was discussed at length in the Taskforce Report, with a recommendation that the Australian Government commission a review of the Fair Work Act to examine how it can become a more effective avenue for wage redress for migrant workers.[79]

190. The Law Council supported[80] the amendments to the Fair Work Act which were initially to be made by Schedule 5 to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 to permit referral of a small claim before a Court to the Fair Work Commission for conciliation, and, where the parties agree, arbitration.

191. Those amendments were not included in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) and there is still not a referral power of that kind in the Fair Work Act. The Law Council maintains the position that a referral power of that kind would assist migrant workers in the resolution of their wage claims.

192. The Law Council submission to the Senate Standing Committees on Education and Employment in respect of that Bill also noted that the capacity of the Fair Work Commission to resolve claims would be further enhanced if the Fair Work Commission could not only conciliate but also arbitrate such claims (other than with the permission of the parties).[81]

193. The submission noted that recalcitrant employers who are refusing to pay wages due are unlikely to be affected by a system that obligates them to attend a conciliation but does not contain the power to require them to pay.

194. Where the Fair Work Commission has a power to arbitrate, the very existence of that power is more likely to lead to agreed outcomes in conciliation. That is for two reasons. First, a party knows there is no point maintaining an unreasonable position. Second, the parties know that if they do not reach agreement there is the potential for an outcome to be forced upon them which they may find less attractive.

195. The Law Council understands this is largely a matter for the FWO. However, the Law Council suggests consideration be given to addressing these kinds of issues in the Assurance Protocol between the FWO and the Department.

196. Recommendation 21 of the Taskforce Report, which was published in March 2019, recommends that the FWO and the Department review, within 12 months, the effectiveness of the Assurance Protocol. The Context Paper published by the Department with its Exposure Draft of the Bill[82] suggests that recommendation will be addressed separately. It is unclear whether the review has occurred or is ongoing.

197. The Law Council has received feedback that:

- there is low public awareness of both the existence of the Assurance Protocol and the way in which it operates;

[79] Professor Allan Fels AO and Professor David Cousins AM, n 2, 93-97.
[80] Law Council of Australia, *Submission to the Senate Standing Committees on Education and Employment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, 5 February 2021, <https://www.lawcouncil.asn.au/publicassets/6e68dce7-5c6b-eb11-9439-005056be13b5/3955%20-%20Fair%20Work%20Amendment%20Bill%202020.pdf>, [103]-[107].
[81] Ibid.
[82] Department of Home Affairs, 'Migration Amendment (Protecting Migrant Workers) Bill 2021 – Exposure Draft – Context Paper', <link>.

- the Assurance Protocol, as it is currently promoted, does not provide sufficient certainty for visa holders in alleviating their fear of visa cancellation, in order to achieve its intended purpose of facilitating more active workplace complaints;

- the Assurance Protocol would benefit from more extensive publicity as well as further clarity regarding the scope of protection it provides.

198. The Law Council would welcome further timely developments on the recommended review of the Assurance Protocol.

Recommendation

- **The Law Council recommends the Department, working with the FWO:**
  - **consider measures to encourage migrant workers to make complaints and support them in that process; and**
  - **expedite the review of the Assurance Protocol.**