THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration Amendment (Strengthening Employer Compliance) Bill 2023 [Provisions]

1. Senator SCARR: Okay. Maybe you can take this on notice, because for me it's an important point. I look at some of these terms—we haven't even talked about 'undue influence' or 'undue pressure', and I don't know if there's any case law on what 'undue influence' or 'undue pressure' mean. When the bill comes before the Senate, from my perspective I'd like to understand clearly what is contained within the scope of the provision and what isn't, and I'm struggling. I think at the extremities of the behaviour you can get it; clearly, something's going to fall within it. But I have concerns about unintended consequences. You can all take that on notice. If you don't have any further comments, that's fine.

Our understanding is that the expressions “undue influence”’ and “undue pressure” have a long of history have been subject of significant jurisprudence. In the interests of clarity and certainty, it would be desirable for the Bill to expressly adopt those definitions.

We are also concerned about novel expressions like “arrangement in relation to work” and “adverse effect on [the worker’s] continued presence in Australia”. Those expression are inherently vague, not defined in the Bill, and have no predetermined meaning. As such, they are open to novel interpretations. They create uncertainty and the potential for the Bill to have an impact beyond its (justifiable) objects.

2. Senator SCARR: Can I suggest you take that on notice and have a read of the Law Council of Australia's submission. In particular, I'm interested in your response to the questions they raise around the power of the minister to make a prohibited employer declaration. They make a number of recommendations with respect to amending the bill so that the criteria are relevant to the minister's decision to make a prohibited employer declaration actually in the bill rather than in the regulations. They also make some recommendations about the scope of the minister's power to determine the length of time an employer may be subject to such a declaration and limits in terms of having a graduated process. From my perspective, I'm interested to know your thoughts about whether or not there need to be more detail. I think this comes back to a point someone made that one of these declarations could put someone out of business. So it seems to me there's a whole range of considerations and factors—a first breach, how long you would expect someone to be prohibited, how serious the offence would have to be, presumably repeated breaches for a longer period of time

until maybe they are put out of business. Maybe they need to be put out of business if there are repeated breaches. From my perspective, that's a key issue in relation to the bill. So if I could ask you to take it on notice to have a look at the Law Council's submission and come back with respect to that particular point.

We will defer to the Law Council on their more detailed response on the execution by the Minister of proposed powers under this Bill, specifically their recommendation to amend the bill so that the criteria relevant to the Minister's decision to make a prohibited employer declaration are prescribed in primary legislation. More broadly across the Bill, we support provisions that ensure procedural fairness and penalties that are commensurate with breaches of the law.

3. CHAIR: I note the answers you gave to Senator Scarr in relation to the definitions of the new criminal penalties. For the sake of Hansard, there are already criminal penalties in relation to some conduct of employers. These new offences are in addition to criminal offences preventing allowing a lawful noncitizen to work in breach of a work condition, allowing an unlawful noncitizen to work, referring a lawful noncitizen for work in breach of a work related condition and aggravated offences in relation to that. So there are a few already, but this new offence deals with that situation where there is essentially a link between the coercion and the visa or the work condition. I note your answers to Senator Scarr but, in relation to the concerns you raise around the definition, can you point to any other definition in legislation, maybe even a state based definition, that you would like to see incorporated in the bill to provide that clarity for your members?

Ms Tinsley: We'll have to take that on notice and come back to you with some wording, if that would assist.

CHAIR: Yes, okay. What is the key thing that you want to exclude from the definition?

Mr Shannon: I'm not sure if there is anything explicitly. Again, I'd have to take it on notice. I encourage my colleague at the Fresh Produce Alliance to maybe reenforce some of the comments earlier about it being enforceable and that being a really important part of how the bill is framed and it's clearly understood that, wherever possible, it draws on existing definitions that are commonly understood in the law. I'm no lawyer—and I just put that on the record—so I won't hazard to define anything right here. I note that in our submission we draw attention to some particular terms not being defined anywhere necessarily, so I guess it is really important at this time that we do put some structure around those words.

Please refer to our response to the first question above.

4. CHAIR: Mr Shannon, I don't think you were in your role in 2005—I know I wasn't in mine then—but in 2005 the department of immigration at the time introduced an industry outreach program, and it had about 15 officials based at around 25 different industry partners. The idea was that there were department officials based in industry organisations and partners—specifically, peak bodies—to help facilitate information and engagement. This included officials that were based at the NFF and at ACCI, as well as at a couple of other industry groups. This model ceased under the former government. Do you think that a formal, industry based outreach program would be an effective tool to help an organisation like yours assist employers better to understand their obligations and new laws under the visa system? Do you recall that arrangement with your organisation?

Mr Shannon: No, I don't. That's a great example, though, and—without better understanding exactly what was rolled out in 2005 and how that might have worked and the reasons it was ceased—I think we could probably support that sort of measure and that sort of investment in principle. CHAIR: Do you want to take that on notice? Someone in your organisation might be able to recall that arrangement and what the benefits were—

Mr Shannon: Sure

We are aware of past arrangements where staff from the Department of Migration were seconded to peak bodies or simply worked from industry offices to answer visa questions and respond to concerns about process. This service was valued at the time and would be supported if reinstated.