Law Council
OF AUSTRALIA

Attachment

Migration Amendment (Strengthening Employment Compliance) Bill 2023 (Cth)—response to questions taken on notice

Question 1

> *Senator SCARR: Dr Neal, there were two cases referred to by the Australian Chamber of Commerce and Industry in their evidence. I put the question to the Australian Chamber of Commerce Industry. I didn't write down the case names but they referred to one case where 'coercion' had been interpreted to mean 'an intent to negate choice'. Then they referred to another case where it had been referred to as 'a form of inducement, but a nasty form of inducement'. They sought to imply that there was some sort of distinction or divergence between the interpretations given in those two cases. That then led to their request that a definition of 'coercion' be inserted into the bill. I'm happy for you to take that on notice if you want to get the Hansard of what they actually said and the cases they referred to. Your answer made sense to me, but I'm keen to flush this issue out. Do you have any comments?*

Law Council's response

Relevant evidence

1. The evidence of the Australian Chamber of Commerce and Industry to which the Law Council has been asked to respond is as follows:

> *If I may, I will use two different case examples. In NTEU v Commonwealth of Australia, the Federal Court case, it was found that an intent to coerce was defined as 'an intent to negate choice, and not merely an intent to influence or to persuade or induce'. On the other hand, in a matter before, again, the Federal Court, FSU v Commonwealth Bank of Australia, His Honour stated that it was almost the opposite, that it was a form of inducement. His Honour said: What constitutes coercion? Presumably it is no more than one form of inducement, but a particularly nasty form. I guess, in terms of your question about what the distinction is, it's just not clear. I think it's a really simple fix. It's just a recommendation that the government actually define what is meant by coercion, to put that without doubt.*[1]

2. Based on the description of the findings in these cases, the Law Council has proceeded on the basis that the two judgments that were referred to are, respectively:

   - *National Tertiary Education Industry Union v Commonwealth of Australia* [2002] FCA 441; 106 IR 139 (**NTEU v Cth**); and
   - *Finance Sector Union v Commonwealth Bank of Australia* [2000] FCA 1372; 117 FCR 114; 114 IR 20 (**FSU v CBA I**).

[1] Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, Brisbane, 21 August 2023, 4 (Ms Jessica Tinsley).

3. FSU v CBA I was an interlocutory judgment of the Federal Court of Australia. The meaning of the term 'coerce' was further considered in the final judgment of the Federal Court in that matter, *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2000] FCA 1468; 106 FCR 16 (**FSU v CBA II**).

The judgments on which the Law Council's view is sought

4. FSU v CBA I and II and NTEU v Cth all relate to section 170NC(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (now repealed), which relevantly provided that [emphasis added]:

> *(1) A person must not:*
> *(a) take or threaten to take any industrial action or other action; or*
> *(b) refrain or threaten to refrain from taking any action;*
> *with intent to **coerce** another person to agree, or not to agree, to:*
> *(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or*
> *(d) approving any of the things mentioned in paragraph (c).*

5. In FSU v CBA I, Finkelstein J briefly considered the meaning of 'coercion'. His Honour stated:

> *What constitutes coercion? Presumably it is no more than one form of inducement, but a particularly nasty form. A person will coerce another to act in a particular way if the first person brings about that act by force. It is for that reason that a threat will amount to coercion. Coercion will cause a person to act in a way that is, in a sense, non-voluntary (I do not mean involuntary in the legal sense).*[2]

6. The question was revisited in more depth in the final judgment of Gyles J in FSU v CBA II. His Honour considered the ordinary meaning of the term 'coercion' by reference to dictionary definitions.[3] This included the Macquarie Dictionary, which then—as it still does[4]—defined 'coercion' as:

> *1. To restrain or constrain by force, law, or authority; force or compel, as to do something.*
> 2. *To compel by forcible action.*

7. Gyles J stated:

> *All of the dictionary meanings involve the negation of choice or compulsion. In my opinion, there is a significant difference in ordinary meaning between concepts such as influence, persuasion, inducement and the like, on the one hand, and coercion, on the other.*[5]

8. His Honour went on to conclude that the ordinary meaning of 'coerce' was consistent with the authorities and should be applied.[6]

[2] *Finance Sector Union v Commonwealth Bank of Australia* [2000] FCA 1372; 117 FCR 114; 114 IR 20 [40].
[3] *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2000] FCA 1468; 106 FCR 16 [19].
[4] Macquarie Concise Dictionary (Eighth Edition), 2020 'coercion'.
[5] *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2000] FCA 1468; 106 FCR 16 [20].
[6] Ibid [25], [36].

9. In NTEU v Cth, Weinberg J reviewed the reasoning of Gyles J in FSU v CBA II and indicated that in his view the reasoning correctly stated the reach of the provision.[7]

10. His Honour stated:

> *The approach to the expression "intent to coerce" taken in each of the authorities set out above makes it clear that what is required is an intent to negate choice, and not merely an intent to influence or to persuade or induce. Coercion implies a high degree of compulsion, at least in a practical sense, and not some lesser form of pressure by which a person is left with a realistic choice as to whether or not to comply*.[8]

11. This passage from Weinberg J has been cited with approval in several recent cases before the Federal Court of Australia and the Federal Family and Circuit Court of Australia.[9]

12. The High Court of Australia has, in relation to provisions in the *Fair Work Act 2009* (Cth), also found that to coerce means to negate choice.[10]

13. The Federal Court has similarly found in relation to section 344 of the Fair Work Act—which, as discussed in response to question 3, appears to have been drawn on in the drafting of this Bill—that 'coercion' may be understood as requiring 'an intent to negate choice, and to do so by conduct, which is unlawful, illegitimate or unconscionable'.[11]

14. The parts of these judgments that address the meaning of 'coercion', and the parts of the judgments cited below that address the meaning of 'undue influence' and 'undue pressure' in section 344 of the Fair Work Act, are essentially based on dictionary definitions. It would be preferable not to define the terms further.

Question 2

> *Senator SCARR: Would it be possible for the Law Council to take on notice some examples of exactly that sort of case study in terms of how this could operate in practice? I think that's a very good example because it speaks to the issue of the minister having up to five years in order to make these declarations. So the employer might have moved through one period of prohibition, a bar, and then it's almost like double jeopardy, where a second penalty is imposed. I would have thought that that would be an example of something the minister should consider, as to whether or not the employer has suffered a penalty as a result of the misconduct. You don't want to impose an additional penalty over and above the penalty suffered. I'd be interested to know a bit more detail with respect to some case studies on the issues in practice that could arise and, potentially, on what sort of provisions or detail should be in the bill. I also ask that wearing my hat as a member of the scrutiny committee to the Senate, and this is obviously—*

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[7] *National Tertiary Education Industry Union v Commonwealth of Australia* [2002] FCA 441; 106 IR 139 [99]-[100] (Weinberg J).

[8] Ibid [103].

[9] *Basi v Namitha Nakul Pty Ltd* [2022] FCA 712 (Halley J) [440]; *Haley v Laing O'Rourke Australia Management Services Pty Ltd* (No 3) [2022] FedCFamC2G 97 (Judge Manousaridis) [27]; *Lim v Flinders University of South Australia* (No 3) [2021] FCCA 614 [277]; *Australian Building and Construction Commissioner v Molina* (29 May 2020) [2020] FCAFC 97; 277 FCR 223; 295 IR 414 [96].

[10] *Esso Australia Pty Ltd v Australian Workers' Union* [2017] HCA 54; 263 CLR 551 [2] (Kiefel CJ, Keane, Nettle and Edelman JJ).

[11] *Australian Federation of Air Pilots v Jetstar Airways Pty Ltd* [2014] FCA 15 at [12] (Pagone J), citing *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2009) 174 FCR 526, 540 [47].

Law Council's response

15. Proposed section 245AYK(1)[12] provides:

> *(1) The Minister may, in writing, declare a person to be a prohibited employer if:*
>
> *(a) the person is subject to a migrant worker sanction under a particular provision of this Subdivision; and*
>
> *(b) the period of 5 years starting on the day the person became subject to a migrant worker sanction under that provision has not ended.*

16. The purpose of allowing the Minister (or delegate) to declare a person to be a prohibited employer for up to 5 years after the original sanction is not clear.

17. It is not clear on the face of the legislation. As discussed in the Law Council's submission to this inquiry, the Migration Amendment (Strengthening Employer Compliance) **Bill** 2023 (Cth) does not set out any criteria that apply to the Minister's decision to make a prohibited employer declaration or provide any other guidance to inform this decision.[13] The Minister would be obliged to consider the information provided by the employer and 'any criteria' prescribed by the regulations.[14] It is not mandatory that such criteria be prescribed.

18. The Explanatory Memorandum does not explain why this power would be available for a 5-year period, neither does the **Department** of Home Affairs' submission to this inquiry.

19. Possible reasons for the 5-year period could be:

- to allow sufficient time for the sanction to come to the attention of the Minister (or delegate) and for any merits or judicial review proceedings to take place, before declaring the person a prohibited employer; or
- to allow for the decision maker to change their position on whether to declare an employer subject to a migrant worker sanction to be a prohibited employer. That is, having initially decided not to make a prohibited employer declaration, to later form a different view and decide to make a prohibited employer declaration (subject to the natural justice process), based on other information which has come before them at some point over the 5-year period.

20. In any event, under the current legislation and without further guidance, an employer could face a 5-year period of uncertainty as to whether they may be declared a prohibited employer. This could affect their ability to make planning and recruitment decisions which depend on employing new temporary visa holders.

21. As discussed in the hearing, this could have a particularly incongruous application in circumstances when the migrant worker sanction to which the employer is subject is a sponsorship bar under sections 140M(1)(c) or (d) of the *Migration Act 1958* (Cth).[15]

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[12] Item 5 of Schedule 1 to the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth).
[13] Law Council of Australia submission 15 to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (2 August 2023) (**Law Council submission to this inquiry**) [112]-[127].
[14] Proposed paragraph 245AYK(5)(b) of the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) (**Bill**).
[15] Ibid under proposed paragraph 245AYE(1)(c).

22. Sections 140M(1)(c) or (d) respectively, and relevantly, permit the Minister to bar an approved sponsor from sponsoring more people under the terms of one or more existing specified approvals or from making future applications for approval as a work sponsor.[16] The difference between a sponsor bar and being subject to a prohibited employer declaration is that:

- a sponsor bar effectively prohibits the person from sponsoring more people under an employer sponsored visa, such as a Subclass 482—Temporary Skill Shortage visa; and
- a prohibited employer declaration prohibits the person from allowing an additional non-citizen to begin work—who could be either a person sponsored under an employer sponsored visa or a person who holds a visa under the General Skilled Migration (**GSM**) scheme.[17]

23. The Minister may bar a sponsor under these powers if the sponsor has failed to satisfy a sponsorship obligation mentioned in Division 2.19 of the *Migration Regulations 1994* (Cth).[18] These obligations include: to co-operate with inspectors;[19] to pay reasonable and necessary travel costs of a sponsored person;[20] to keep records[21] or provide records or information to the Minister;[22] to provide information to the Department when certain events occur, [23] such as a change to the work duties of a sponsored person[24] or of the appointment of a new director to the entity;[25] or to fail to ensure the sponsored person works in their nominated occupation.[26]

24. The criteria that must be taken into account in determining whether to impose a bar are prescribed in regulation 2.89(3). There is no guidance in the legislation as to the length of the bar that may be imposed. The Department's submission to this inquiry states that 'sponsor bars under the existing 'Sponsor obligations' framework of the Migration Act have typically ranged from 12 months to 5 years for a sponsor bar'.[27]

25. The Bill would effectively enable the Minister (or delegate) to impose a second penalty on a person for breaching a sponsorship obligation, such as those mentioned above. It could do this, for example, by declaring the person a prohibited employer:

- for the period of the sponsor bar—thus resulting in them being unable to employer persons on temporary GSM visas (under the prohibited employer declaration) or to sponsor persons under the employer nomination scheme (under the sponsor bar); or

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[16] The sponsor bar may also be imposed on a family sponsor – see definition of 'approved sponsor' in subsection 5(1) of the *Migration Act 1958* (Cth). See also, Subdivision 2.19.2 of the Migration Regulations 1994 (Cth). Family sponsors are not expressly excluded from being declared prohibited employers, which may be an oversight in the drafting.
[17] Such as a Skilled – Recognised Graduate (subclass 476) visa, a Temporary Graduate (subclass 485), or a Skilled Work Regional (Provisional) (subclass 491) visa.
[18] Migration Regulations 1994 (Cth) subreg 2.89(2).
[19] Ibid reg 2.78.
[20] Ibid reg 2.80.
[21] Ibid reg 2.82.
[22] Ibid reg 2.83.
[23] Ibid reg 2.84.
[24] Ibid para 2.84(3)(aa).
[25] Ibid para 2.84(e).
[26] Ibid reg 2.86.
[27] Department of Home Affairs submission 4 to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Strengthening Employer Compliance) Bill 2023 14.

- if the sponsor bar is less than 5 years, *after* the sponsor bar ends, for some additional period up to the 5 year period.

26. Either result would expand the consequence of the breach of the sponsorship obligation beyond what is currently possible under sections 140M(1)(c) or (d). There may be good reasons for this in certain circumstances of severe worker exploitation. In circumstances—such as for a low-level contravention which occurred years ago—it could potentially have an onerous result. This could unfairly compromise the ability of a business to plan ahead, and potentially affect its economic growth and productivity.

27. It is a principle of the rule of law that Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used.[28]

28. That principle could be pursued in this circumstance by providing greater guidance in the Act about the exercise of the prohibited employer declaration.

29. Firstly, by providing further clarity about *when* the prohibited employer declaration may be exercised. Such guidance could address the circumstances in which it may be appropriate to make a prohibited employer declaration after having made a sponsor bar decision. The best practice approach would be to amend the Bill so that the criteria relevant to the Minister's decision to make a prohibited employer declaration would be prescribed in the Migration Act. Alternatively, but less preferably, the Bill could be amended so that the power to make regulations is confined by guidance or directions in primary legislation as to the kinds of matters that may be prescribed.[29]

30. Secondly, by providing a limit on the period for which the prohibited employer declaration can be imposed. Currently, this is not even a matter that can be prescribed by regulations: the period is entirely within the Minister's control.[30] In its submission, the Law Council recommended that period of the prohibition should be proportionate to the nature and significance of the migrant worker sanction to which the employer is subject. There should be a maximum declaration period and a requirement to review the continuing appropriateness of a declaration after a certain period.[31] Consideration could be also given to providing that the prohibited employer declaration should not exceed the period of the sponsorship bar.

31. Finally, the Law Council suggests that there be greater clarity around the reasons the prohibited employer declaration power is available for five years after a person becomes subject to a migrant worker sanction. Given the adverse impact on employers facing an extended period of uncertainty about their ability to employ temporary visa holder, there should be good reasons, ideally articulated in the Act itself, why it is appropriate for a prohibited employer declaration to be imposed greater than 12 months after the person becomes subject to a migrant worker sanction.

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[28] Law Council of Australia, Policy Statement – Rule of Law Principles (March 2011) principle 6 on page 4 https://lawcouncil.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf.
[29] Law Council submission to this inquiry recommendation box under [127].
[30] See proposed subsection 245AYK(8).
[31] Law Council submission to this inquiry recommendation box under [132].

32. Annexure A provides cases studies which demonstrate:

- a potential circumstance in which an employer faces a second enforcement action for the breach of a sponsorship obligation should the Bill pass in its present form; and
- a potential circumstance in which a temporary visa-holder does not come forward in fear of losing their pathway to permanent residence to demonstrate the kind of scenario discussed in [137]–[138] of the Law Council's submission to this inquiry.

Question 3

> *CHAIR: Thank you. I appreciate that. Your submission also makes several strong recommendations about the manner in which the bill has been drafted. They're obviously very technical legal questions. I think you've traversed some of them with Senator Scarr. In regard to the word 'undue', I know we've gone over it quite a lot. You've taken a few things on notice. If it's easier, I'm happy for you to take on notice—I asked this of our previous witnesses—whether there's an example of a law, whether it be federal or state, that is closer to the definition that the Law Council would like to see—just an example that we can point to, perhaps from a legislative point of view, to see how it could be drafted.*
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> *Ms Ford: Are you asking in relation to a definition of what constitutes 'undue'?*
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> *CHAIR: Yes.*
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> *Ms Ford: Matthew and Dr Neal, are we happy to take that on notice, or do you have any comment on that?*
>
> *Dr Neal: Yes, we would be.*

Law Council's response

33. The Law Council has focused on proposed section 245AAA in the response to this question.[32]

34. The Department, in the evidence it provided to this Committee in a hearing on 21 August 2023, provided definitions for terms 'coercion', 'undue influence' and 'undue pressure'.[33] It indicated that the definitions were consistent with the approach taken in other Acts, including the Fair Work Act.[34]

35. Relevantly, section 344 of the Fair Work Act provides:

> ***344 Undue influence or pressure***
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> *An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:*
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> *(a) make, or not make, an agreement or arrangement under the National Employment Standards; or*

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[32] This is consistent with [55] of the Law Council submission to this inquiry.
[33] Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, Brisbane, 21 August 2023, 52 (Mr David Gavin).
[34] Ibid 53 (Mr David Gavin).

(b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or

(c) agree to, or terminate, an individual flexibility arrangement; or

(d) accept a guarantee of annual earnings; or

(e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

36. There are key differences between section 344 of the Fair Work Act and proposed section 245AAA.

37. One difference is that section 344 of the Fair Work Act is a civil penalty provision, without apparent fault elements, whereas contravention of proposed section 245AAA would be a criminal offence subject to fault elements.

38. Another difference is that section 344 of the Fair Work Act does not include a limb that addresses the result of the undue influence or undue pressure. In contrast, the proposed section 245AAA also includes a limb that deals with the result of the undue influence or undue pressure.

39. To demonstrate—section 344(e) of the Fair Work Act in effect provides:

> *An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee … to agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.*

40. Proposed section 245AAA in effect provides:

> *A person (the first person) contravenes this subsection if: the first person coerces, or exerts undue influence or undue pressure on, another person (the worker) [who is a lawful non-citizen holding a visa subject to a work related condition] to accept or agree to an arrangement in relation to work [to be done in Australia]* [**first limb**];[35] and
>
> *the worker is in breach of the work-related condition solely because of doing the work in accordance with the arrangement; or the worker would be in breach of the work-related condition if the worker were to do the work in accordance with the arrangement* [**second limb**].[36]

41. Section 344 of the Fair Work Act does not contain an equivalent 'second limb', which provides for the result of agreeing to the arrangement that the employer is applying 'undue' pressure or influence on the person to accept. (In proposed section 245AAA, the employer must have knowledge that working in accordance with the work arrangement would have that result, or be reckless as to that result.)[37]

42. The Law Council agrees that the Department's description of the common law meaning of the terms in section 344 of the Fair Work Act is accurate and would, as the Department suggests, likely apply to proposed section 245AAA. It is necessary however, to consider how those definitions would operate in proposed section 245AAA, noting the differences between the two provisions identified in paragraphs [36]-[41].

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[35] This encapsulates proposes paragraphs 245AAA(1)(a)-(d).
[36] This encapsulates proposes paragraph 245AAA(1)(e).
[37] Proposed subsection 245AAA(3).

43. The Federal Court of Australia decision of *Australian Federation of Air Pilots v Jetstar Airways Pty Ltd* [2014] FCA 15 appears to be the lead authority on the meaning of 'undue' influence or pressure in section 344 of the Fair Work Act. Air Pilots turned on a potential breach of section 344(e), extracted above at [39].

44. Pagone J implicitly endorsed key findings in *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2009] FCA 235; 174 FCR 526[38] that:

- 'coercion' may be understood as requiring 'an intent to negate choice, and to do so by conduct, which is unlawful, illegitimate or unconscionable';[39] and

- 'undue pressure, in the context of industrial law, should not be assumed to carry with it the same meaning as that comprehended by the equitable doctrine of undue influence'.[40]

45. Pagone J then, consistent with first principles of statutory interpretation, considered the ordinary meaning of the term 'undue pressure', focussing on 'undue':

> *The conduct prohibited by s 344 is that described by the composite phrase "undue influence or undue pressure" and a fundamental aspect of the phrase is that the influence or pressure must be "undue". For pressure or influence to be "undue" it must, at least, be unwarranted or inappropriate by being excessive or disproportionate: see Australian Oxford English Dictionary, 4th ed, "undue" at 1561. The notions of excess and disproportionality are implicit in the concept of something being "undue"; that is, that the pressure or influence is something other than that which is "due".*[41]

46. This reasoning has been endorsed by several subsequent decisions.[42] It is the construction used by the Department's evidence to this inquiry.[43]

47. It is likely that a Court would interpret the phrase 'coercion, undue influence and undue pressure' in proposed section 245AAA consistently with Pagone J's construction of section 344, noting that they are both operating in similar industrial law contexts.

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[38] A case which related to a similar provision of the now repealed *Fair Work (Building Industry) Act 2012* (Cth).

[39] *Australian Federation of Air Pilots v Jetstar Airways Pty Ltd* [2014] FCA 15 at [12] (Pagone J), citing *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2009) 174 FCR 526, 540 [47].

[40] Ibid citing *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2009) 174 FCR 526, 540 [56]-[57]. The equitable doctrine of undue influence applies a basis to rescind a contract when the influence imposed on one person to persuade the other to accept it is regarded as undue in law – see Lexis Nexis, *Halsbury's Laws of Australia,* v 110 (at 26 February 2020) IV Vitiating Factors, '6 Undue Influence' [110 – 5810]. The High Court of Australia has discussed the term in the context of whether the person influenced will be engaging in a free act: Thorne v Kennedy [2017] HCA 49; 263 CLR 85 at [30]-[32] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[41] *Australian Federation of Air Pilots v Jetstar Airways Pty Ltd* [2014] FCA 15 at [13] (Pagone J).

[42] For example: *Xie v Ecot Pty Ltd* [2022] FedCFamC2G 104 (Judge A Kelly) at [226] and *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 2)* [2017] FCA 1046; (2017) 69 AILR 102–860 (Wigney J) at [14].

[43] Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, Brisbane, 21 August 2023, 52 (Mr David Gavin).

48. If that construction is applied to proposed section 245AAA, a person (**employer**) will commit a criminal offence under that provision if they:

- impose unwarranted, excessive or disproportionate pressure or influence on a temporary visa holder to accept a work arrangement; and

- know, or are reckless to the fact that the temporary visa holder doing the work in accordance with that work arrangement will result in the visa holder breaching a work-related condition.

49. In the hearing, the Committee asked questions directed to determining whether the term 'undue' should be retained.[44]

50. Essentially, that is a question as to whether there are some circumstances in which it would be excusable for an employer to influence or pressure a visa holder to accept a work arrangement that the employer knows will result in the visa holder breaching a work-related condition, or is reckless as to that result.

51. The Law Council does not have a view on that question: it is a policy question on which the Department may advise.

52. The Law Council considers the prevailing statutory context should be considered. This is that section 245AB of the Migration Act already provides that a person will commit an offence if they *allow* a person to work in breach of a work-related condition and have not taken reasonable steps at reasonable times to verify that the worker is not in breach of the work-related condition solely because of doing the work.

53. It is likely that courts would apply proposed section 245AAA consistently with the Pagone J interpretation. Removal of the word 'undue' would imply an intention to apply a different and more stringent interpretation than the one applied by Pagone J.

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[44] Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, Brisbane, 21 August 2023, 13 (Senator Paul Scarr).

Annexure A

The following case studies demonstrate:

- a potential circumstance in which an employer faces a second enforcement action for the breach of a sponsorship obligation should the Bill pass in its present form—scenario 1; and
- a potential circumstance in which a temporary visa-holder does not come forward in fear of losing their pathway to permanent residence to demonstrate the kind of scenario discussed in [137]–[138] of the Law Council's submission to this inquiry—scenario 2.

Scenario 1: An employer faces a second punishment for the same sponsorship obligation breaches

1. In June 2023, Zero Nonsense Company Pty Ltd was found in breach of several sponsorship obligations under the *Migration Regulations 1994* (Cth).
2. This included a breach of the obligation under regulation 2.79, to ensure equivalent terms and conditions of employment; a breach of regulation 2.83, to provide records and information to the Minister; and a breach of regulation 2.86, to ensure the primary sponsored person works or participates in the nominated occupation, program, or activity.
3. As a result, Zero Nonsense's approval as a sponsor was cancelled and they were barred from sponsoring other workers for 12 months. For the breaches of obligations under regulations 2.79 and 2.86, they were issued an infringement notice of AUD 16,500.
4. In June 2024, Zero Nonsense have implemented new internal processes to ensure that they will remain compliant with their employer and sponsor obligations. They want to apply for approval as a sponsor again.
5. In September 2024, Zero Nonsense receive a written notice that, under section 245AYK, the Minister proposes to declare the company to be a prohibited employer, which would prevent them from allowing additional non-citizens to begin work. Zero Nonsense make a written submission detailing why the declaration should not be made and wait to hear what the Minister decides to do with his discretionary power to declare them a prohibited employer.

Scenario 2: An exploited temporary visa-holder does not come forward in fear of losing pathway to permanent residence

1. Michael works as a chef at Catch Me Café on a subclass 482 visa. He has been working there for the last two years and is eager to apply for permanent residency under the Employer Nomination Scheme Temporary Residence Transition stream in one year's time.
2. After a particularly disappointing summer, Catch Me Café is struggling to remain profitable and seeks to recover the SAF levy costs from Michael or threatens to reduce his hours.

3. Michael undertakes some internet research and learns that recovering the SAF levy from a sponsored person is a breach of the sponsorship obligation under regulation 2.87. He thinks that this could result in Catch Me Café being declared a prohibited employer under section 245AYK and reads that an employer being declared as such will not have any adverse impact on a sponsored employee.

4. Before reporting Catch Me Café to the Fair Work Ombudsman, Michael decides to speak to a lawyer to confirm that this would not jeopardise his chances of getting permanent residency. He learns that a past declaration as a prohibited employer might constitute 'adverse information' under reg 1.13A against Catch Me Café, which might prevent them from being considered a suitable sponsor for Michael's employer nominated scheme visa application.

5. Michael has now spent over two years as a chef at Catch Me Café and does not want to have to obtain another three years of experience at a new employer before he is eligible for permanent residence. He decides not to take any action against Catch Me Café and reimburses them for the SAF levy as they have requested.