Law Council
OF AUSTRALIA

Migration Amendment (Strengthening Employer Compliance) Bill 2023

Senate Legal and Constitutional Affairs Committee

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Table of Contents

About the Law Council of Australia **4**
Acknowledgement **5**
Executive Summary **6**
Overview of the measures in the Bill **7**
Context and complementary reforms **8**
New work-related offences and penalty provisions **10**
Context 10
Overview of the provisions 11
Proposed new section 245AAA 11
Proposed new section 245AAB 12
Proposed new section 245AAC 12
Discussion 14
Civil penalty provisions 16
Other complementary measures related to unlawful non-citizens 16
Consistency with other offence provisions 17
Prohibited employer declaration scheme **18**
Overview 18
Analysis 19
Consequence of being a prohibited employer 19
Civil penalty and offence 19
Migrant worker sanctions 20
Approved sponsor bar 20
Convicted of various offences 21
Contraventions under the Fair Work Act 24
Nature of the power to declare 24
Criteria for making a decision to declare a prohibited employer 25
Period of the employer declaration power 27
Potential adverse impact on migrant workers 28
Application and retrospectivity 29
Introduction of enforceable undertakings and compliance notices **29**
Retrospective operation 30
Amendments to be made by Part 6 to Schedule 1 ..... **31**
New power to prescribe matters relevant to a cancellation decision 31
The Bill will not achieve its objective 32
The regulations will be directed to the wrong aspect of the cancellation power 33
The regulations cannot bind the Minister 33
The empowering provision is not directed towards ensuring the outcome which appears intended 34

Concerns with the Assurance Protocol 34
Preferred approach ..... **Error! Bookmark not defined.**
Repeal of existing offence provision 35

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
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- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au

Acknowledgements

The Law Council of Australia (**Law Council**) is grateful to the Migration Law Committee of its Federal Dispute Resolution Section and the Law Institute of Victoria (**LIV**) for their substantive contributions to this submission. It also appreciates the input from the Business and Human Rights Committee and the National Criminal Law Committee.

Executive Summary

1. The Law Council is pleased to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) (**2023 Bill**).

2. The Law Council supports measures to better protect migrant workers from the risk of workplace exploitation. Its view is that temporary visa holders should be entitled to the same pay, conditions, and workplace protections as Australian workers.[1]

3. The Bill provides for the same general framework of reforms to the *Migration Act 1958* (Cth) as the Migration Amendment (Protecting Migrant Workers) Bill 2021 (**2021 Bill**), which was introduced to Parliament during its last term, but ultimately not enacted. The Law Council has, in this submission, drawn on the submission it made to this Committee's inquiry into the 2021 Bill.[2]

4. The Law Council reiterates its previous submission that, in order for the new regulatory regime proposed by the 2023 Bill to be effective, compliance and enforcement efforts must be markedly increased.[3] Further, it is critical that complementary reforms to increase whistleblower protections for temporary visa holders proceed expeditiously, so that the benefits of the amendments to be made by the 2023 Bill can be realised. Temporary visa holders will only feel confident in reporting exploitation if their visa status is secure.

5. Subject to that proviso, the Law Council generally supports the measures proposed by the 2023 Bill, which are largely consistent with the recommendations of the Migrant Workers' Taskforce Report to which they respond. The Law Council has in this submission sought to assist the Committee's consideration of the Bill by:

    - raising some drafting queries in relation to proposed new offences and civil penalty provisions that would apply when a person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work;
    - setting out additional measures that could assist to regularise the status of unlawful non-citizens and thus mitigate the risk of exploitation;
    - recommending that rule of law improvements to the proposed new prohibited employer scheme be brought into the 2023 Bill itself, including for significant elements of the scheme (under the 2023 Bill, these would be prescribed in regulations);
    - drawing attention to a potential error in the application provision for the enforceable undertakings regime to be inserted by the 2023 Bill; and
    - recommending the repeal of a proposed power to prescribe additional matters which must, must not or may be considered in a visa cancellation decision.

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[1] Law Council, Submission to the Senate Education and Employment Legislation Committee, 'Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023' [3] https://lawcouncil.au/publicassets/fad74933-68e5-ed11-9480-005056be13b5/4347%20-%20S%20-%20Fair%20Work%20Legislation%20Amendment%20%20Protecting%20Worker%20Entitlements%20%20Bill%202023.pdf.

[2] Law Council, Submission to the Committee, 'Migration Amendment (Protecting Migrant Workers) Bill 2021' (**Law Council submission on the 2021 Bill**) https://lawcouncil.au/publicassets/04c9cd66-f38a-ec11-9449-005056be13b5/4163%20-Migration%20Amendment%20%20Protecting%20Migrant%20Workers%20%20Bill%202021.pdf.

[3] Ibid [181]-[182].

Overview of the measures in the Bill

6. The 2023 Bill would amend the 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.

7. In summary, the 2023 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 an arrangement in relation to work which may produce specific adverse results (discussed below) (**new work-related offences and penalty provisions**) (Part 1 of Schedule 1);
- create a new power for the Minister to declare a person who is subject to a migrant worker sanction to be a 'prohibited employer', and provide for civil penalties and offence provisions if a 'prohibited employer' employs additional non-citizens (**prohibition declaration scheme**) (Part 2 of Schedule 1);
- increase the penalties attaching 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 3 of Schedule 1);
- empower an authorised person to accept and seek enforcement of **enforceable undertakings** in relation to work-related offences and provisions (Part 4 of Schedule 1);
- empower an authorised officer to give **compliance notices** if they reasonably believe that a person has contravened certain civil penalty provisions in the Migration Act (Part 5 of Schedule 1); and
- address the following **miscellaneous matters**:
    - authorise the regulations to prescribe matters to which the Minister must, must not, or may have regard in determining whether they are satisfied of a matter which may provide a ground for cancellation under section 116 of the Migration Act, and the weight to be given to matters so prescribed;[4]
    - repeal offences in the Migration Act imposed when:
        - a lawful non-citizen works in breach of a work condition; or
        - an unlawful non-citizen performs work in Australia whether for reward or otherwise;[5] and
    - insert a provision that provides that, for the purposes of a relevant workplace law, any effect of the Subdivision of the Migration Act that imposes workplace-related offences and civil penalty provisions on the validity of a contract of service, or the validity of a contract for services, is to be disregarded.[6]

8. The Law Council has largely addressed the amendments to be made by Parts 1, 2 and 6 of Schedule 1, with some brief comments on Parts 4 and 5.

[4] 2023 Bill item 37 of Schedule 1.
[5] Ibid item 39 of Schedule 1.
[6] Ibid item 41 of Schedule 1.

Context and complementary reforms

9. The experience of the practitioners who have contributed to this submission accords with the recent observation made by the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, that migrant workers in Australia are experiencing a widespread 'crisis of exploitation'.[7]

10. The Law Council welcomes the Australian Government taking decisive steps to address that exploitation—including by consulting with business, unions and civil society on whistleblower protections for temporary visa holders.[8]

11. In its submission to the Law Council, the LIV emphasised that past attempts to curb migrant worker exploitation, such as increasing penalties and sanctions for employers, have done little to change employer behaviour and prevent the exploitation of workers. It suggests that penalties alone have little practical effect on employer behaviour and suggests that what is needed are robust 'whistle-blower protections' for migrant workers.

12. The view of the LIV's members is that the proposals set out at Parts 1 to 5 of Schedule 1 to the 2023 Bill are premature and should not be implemented until after the protections for temporary visa holders have been put in place. The LIV suggests that without these protections, the amendments proposed in the 2023 Bill will be ineffective and unlikely to achieve the Australian Government's desired policy outcomes.

13. The Law Council agrees that it is critically important that reforms to address migrant worker exploitation, are given effect expeditiously and are coherent and consistent with the 2023 Bill. This includes, in particular, strengthening the availability of whistleblower protections for temporary visa holders.

14. In its submission on the 2021 Bill, the Law Council:

    - advocated for the introduction of a new visa to support migrants to leave exploitative situations quickly and remain in Australia with a right to work;[9] and
    - emphasised the need for further measures 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.[10]

15. The Law Council maintains that position. It is essential that those reforms are given priority and commence as close as possible to the commencement of the provisions proposed by the 2023 Bill. The strong view of the profession is that exploited persons need to have the confidence to come forward to report such exploitation, in order to that the benefits of the new regime will be realised.

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[7] Hon Tony Burke MP and the Hon Clare O'Neil MP, 'Albanese Government to tackle worker exploitation' (Media Release, 5 June 2023) https://minister.homeaffairs.gov.au/AndrewGiles/Pages/albanese-govt-to-tackle-worker-exploitation.aspx#:~:text=Quotes%20attributable%20to%20Minister%20for%20Immigration%2C%20Citizenship%20and%20Multicultural%20Affairs,and%20conditions%20down%20for%20everyone.
[8] Ibid.
[9] Law Council submission on the 2021 Bill [147]-[150].
[10] Ibid [186]-[187].

16. The Law Council further reiterates its submission in relation to the 2021 Bill that, while additional offences and increased penalties to address gaps in the regulatory framework identified in the Report of the Migrant Workers' Taskforce[11] are important, increased investment and meaningful enforcement action are required to achieve the public policy goals of reducing exploitation and abuse of temporary visa holders.[12]

17. The Law Council welcomes the recently announced funding for additional enforcement and compliance activities.[13] The Explanatory Memorandum (**EM**) for the 2023 Bill suggests this is designed to 'support an uplift in immigration compliance and enforcement and to support the implementation of the measures included in this Bill'.[14]

18. At Budget Estimates, Australian Border Force (**ABF**) representatives gave evidence that the additional funding would increase the number of officers in field compliance teams 'that undertake visits to various employers to ensure that they and their employees are compliant with the requirements in the Migration Act'.[15] In response to a question on notice about the precise use of that funding, the Department of Home Affairs (the **Department**) stated that:

> *The Measure includes legislative reform and implementation of measures which will enhance and strengthen enforcement and compliance activities that target migrant worker exploitation. Under the measure:*
>
> - *In 2023–24, 54 ASL will be provided to the Department and the ABF covering frontline roles including field operations, sponsor monitoring unit, intelligence officers and support and enabling roles; and*
> - *In 2024–25, 64 ASL will be provided to the Department and the ABF covering frontline roles including field operations, sponsor monitoring unit, intelligence officers and support and enabling roles.*[16]

19. It is critical that ABF officers are properly trained in the operation of the new regulatory powers to be inserted by the 2023 Bill.

20. It remains to be seen whether the additional resourcing will have a meaningful impact on the volume of compliance activities. According to figures in the Department's 2021–22 Annual Report, the number of:

- '[i]llegal work warning notices issues [sic] to employers of illegal workers' has reduced year on year from 323 in 2017–18 to 81 in 2021–22; and
- '[e]mployer awareness activities delivered to deter foreign worker exploitation' workers' has reduced year on year from 1,346 in 2017–18 to 546 in 2021–22.[17]

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[11] 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>.
[12] Law Council submission on the 2021 Bill [181]-[182].
[13] In the 2023-24 Federal Budget, there was a commitment of '$50.0 million over 4 years from 2023–24 (and $15.3 million per year ongoing) for additional enforcement and compliance activities to maintain the integrity of the migration system': see Commonwealth of Australia, Federal Budget 2023-24, Budget Paper No. 2 162.
[14] EM for the 2023 Bill 4.
[15] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, (23 May 2023) 26 (Mr Michael Outram APM, Commissioner, Australian Border Force).
[16] Department, Response to Question on Notice asked at Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, (23 May 2023) 'BE23-094 - Foreign Worker Exploitation Compliance - Additional Officers'.
[17] Department, Annual Report 2021-22 158.

21. The Annual Report suggests:

> *With the easing of restrictions and opening of international borders, field activities will slowly return to pre-COVID-19 levels by the end of 2022–23 and it is expected that the number of enforcement activities and associated sanction will increase*.[18]

22. With those restrictions now fully eased, the Committee may wish to ask the Department whether compliance actions have increased to pre-COVID 19 levels, as expected.

23. On balance, Law Council supports the 2023 Bill proceeding, subject to the concurrent reforms proceeding expeditiously and the additional funding advancing a real uplift in activity. While new penalties are a part of the 2023 Bill, so are the introduction of regulatory powers—enforceable undertakings and compliance notices—which the Law Council's considers will provide greater flexibility to deal with different levels of contravention and to educate employers, without the need to justify progression to a prosecution.

New work-related offences and penalty provisions

Context

24. According to the EM for the 2023 Bill, the offences and civil penalty provisions introduced by Part 1 of Schedule 1 to the Bill are intended to provide a 'holistic response to the issues that informed Recommendation 19 of the Taskforce Report [Report of the Migrant Workers' Taskforce]'.[19] The EM states:

> *[t]he overarching aim is to address concerns that employers, labour hire intermediaries or others in the employment chain might use the nature of the migrant's visa status to exploit them in the workplace*.[20]

25. Recommendation 19 of the Report of the Migrant Workers' Taskforce 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*.[21]

26. This recommendation was made in the context of the Migrant Workers' 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**).[22]

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[18] Ibid 157.
[19] EM for the 2023 Bill 82.
[20] Ibid.
[21] 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> 12.
[22] Ibid 122.

27. According to the EM, there are limitations and gaps in existing provisions with respect to their application to this kind of conduct.[23] The Law Council supports generally the introduction of offence and civil penalty provisions to address this conduct. However, it considers that the drafting of these provisions could be significantly improved.

Overview of the provisions

Proposed new section 245AAA

28. A person (**employer**) would contravene proposed new section 245AAA if they:

- coerce or exert undue pressure or undue influence on a lawful non-citizen (a visa holder) whose visa is subject to a 'work-related condition' to accept or agree to a work arrangement in Australia done for the employer or someone else;[24] and
- the worker is or would be in breach of the work-related condition because of doing the work in accordance with the arrangement.[25]

29. A work-related condition is a condition prohibiting or restricting work by a visa holder in Australia.[26] A failure to comply with a condition of a visa may provide a basis for that visa to be cancelled.[27] The cancellation of a visa will render the person an unlawful non-citizen, and hence liable to be detained[28] and removed from Australia as soon as practicable.[29] Currently, it is also an offence under the Migration Act for a non-citizen to work in contravention of a prescribed condition restricting the work that the non-citizen may do in Australia,[30] although that offence provision would be repealed if item 39 of Schedule 1 to the 2023 Bill is enacted.

30. To commit an *offence* under proposed section 245AAA, the employer must:

- intend to coerce or exert undue pressure or influence on a visa holder to accept or agree to a work arrangement;[31] and
- know that the non-citizen would breach a work-related condition as a result of that arrangement or be reckless to that outcome.[32]

31. To be liable for a *civil penalty* under proposed section 245AAA, all that matters is that the contravention has occurred—the state of mind of the employer is irrelevant.[33]

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

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[23] EM for the 2023 Bill 84.
[24] Proposed paragraphs 245AAA(1)(a)-(d) of the 2023 Bill.
[25] Ibid proposed paragraphs 245AAA(1)(a)-(d).
[26] Migration Act subsection 5(1).
[27] Ibid paragraph 116(1)(b).
[28] Ibid subsection 189(1).
[29] Ibid section 198.
[30] Ibid subsection 235(1).
[31] 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**).
[32] Subclause 245AAA(3).
[33] Migration Act section 486ZF.

- the employer will be liable for a civil penalty regardless of whether the employer countenanced the possibility of the breach; and
- the employer will have committed an offence only if they knew the breach would result, or they were reckless as to that possibility.

33. The practical effect of proposed new section 245AAA, particularly as it operates as a civil penalty provision, is to place an onus on employers to ensure work arrangements are compliant with work-related visa conditions. The provision responds directly to the terms of Recommendation 19 of the Taskforce Report, and is generally directed, for example, to scenario 1 above: 'persuad[ing] students to work longer hours than permitted under their visa restrictions'.

Proposed new section 245AAB

34. A person (**employer**) would contravene proposed new section 245AAB if they:

- coerce or exert undue pressure or undue influence on an *unlawful non-citizen* (a person who does not hold a visa) to accept or agree to a work arrangement in Australia done for the employer or someone else;[34] and
- the employer's conduct results in the person believing that if they do not accept or agree to the arrangement, there will be an 'adverse effect' on their 'continued presence in Australia'.[35]

35. To commit an *offence* under clause 245AAB, the employer must:

- intend to coerce or exert undue pressure or influence on a person who does not hold a visa to accept or agree to a work arrangement;[36] and
- know that as a result of their coercion, pressure or influence, the person believes that if they do not accept or agree to the arrangement, there will be an 'adverse effect' on their 'continued presence in Australia' or be reckless to that result.[37]

36. The EM for the 2023 Bill suggests the 'adverse effect' on their 'continued presence in Australia' is in effect, their detention and removal from Australia.[38] This is a reference to the operation of:

- subsection 189(1) of the Migration Act—which obliges an authorised officer to detain a person they reasonably suspect to be an unlawful non-citizen; and
- section 196 of the Migration Act—which obliges an officer to remove a detained person from Australia as soon as reasonably practicable (unless they have a visa-related process on foot).

Proposed new section 245AAC

37. A person (**employer**) would contravene proposed new section 245AAC if they:

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[34] Proposed paragraphs 245AAB(1)(a)-(c) of the 2023 Bill.
[35] Ibid proposed paragraph 245AAA(1)(d).
[36] As no fault element is specified for paragraph 245AAB(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**).
[37] Proposed subsection 245AAA(3) of the 2023 Bill.
[38] EM for the 2023 Bill [63].

- coerce or exert undue pressure or undue influence on a *lawful non-citizen* (a visa holder) to accept or agree to a work arrangement in Australia done for the employer or someone else;[39] and
- the employer's conduct results in the worker believing that if they do not accept or agree to the arrangement, there will be:
  - an 'adverse effect' on the worker's status as a lawful non-citizen (subparagraph 245AAC(d)(i)); or
  - the worker will be unable to provide information or documents about work the worker has done in Australia, that the worker is required under law to provide in connection with a visa they hold, or for which they have applied (subparagraph 245AAC(d)(ii)).

38. To commit an *offence* under clause 245AAC, the employer must:

- intend to coerce or exert undue pressure or influence on a visa holder to accept or agree to a work arrangement;[40] and
- know that as a result of their coercion, pressure or influence, the person believes that if they do not accept or agree to the arrangement, there will be an 'adverse effect' on their 'status as a lawful non-citizen' or be unable to provide information or documents about work they have done in Australia or reckless to that result.[41]

39. In relation to proposed subparagraph 245AAC(1)(d)(i), the EM for the 2023 Bill suggests the 'adverse effect' on their 'status as a lawful non-citizen' may include visa cancellation.[42] That is, potentially, the visa holder believes, based on the actions of the employer, that if they do not accept the work arrangement, the employer or prospective employer may give information to the Department which exposes them to the risk of cancellation. For example, because a decision to grant the visa was based on facts which no longer exist,[43] the holder has not complied with a condition of their visa,[44] or a student visa holder is engaging in conduct not contemplated by the visa.[45]

40. This would apply to, for example, the circumstances of scenario 2 identified in the Report of the Migrant Workers' Taskforce, above—i.e. persuading students to accept lower wages on the threat of reporting them for breaching the hours' restriction.

41. Proposed subparagraph 245AAC(1)(d)(ii) could apply where the visa holder believes, based on the actions of the employer, that if they do not accept the work arrangement, the employer or prospective employer may withhold information about work they have done in Australia which is necessary to satisfy the visa criteria.[46]

42. This would apply to, for example, the circumstances of scenario 3 identified in the Report of the Migrant Workers' Taskforce, above—i.e. rationing work and seeking other benefits before signing off on completion of the three-month qualifying period

[39] Proposed paragraphs 245AAC(1)(a)-(c) of the 2023 Bill.
[40] As no fault element is specified for paragraph 245AAB(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**).
[41] Proposed subsection 245AAC(3) of the 2023 Bill.
[42] EM for the 2023 Bill [107].
[43] Migration Act paragraph 116(1)(a).
[44] Ibid paragraph 116(1)(b).
[45] Ibid subparagraph 116(1)(fa)(ii).
[46] EM for the 2023 Bill [107].

applying to working holiday makers who wish to benefit from a second year on a Working Holiday Maker visa.

Discussion

43. All three provisions contain the same first limb: an employer who coerces or exerts 'undue influence' or 'undue pressure' on a migrant worker to accept or agree to a work arrangement.

44. What differs in each is the result of this coercion, influence or pressure:

- in proposed new section 245AAA, the result is that the migrant worker does or would breach a condition of their visa;
- in proposed new sections 245AAB and 245AAC, the result is the migrant worker *believing* that the employer will take an action which has an adverse effect on their immigration status by reporting them to the Department or withholding information they are obliged to provide to the Department.

45. In all three provisions, the employer must know or be reckless to that result.

46. Implicit in each of these provisions is that the worker's acceptance of the work arrangement is in the interests of employer but is not in the interests of the worker themselves. That is, the provisions are directed towards preventing and punishing circumstances in which an employer may exploit a migrant worker.

47. The Law Council supports the intention behind these provisions but considers that the drafting of the provisions must be improved.

48. Central to the Law Council's concern is the term 'undue'. 'Undue' is not defined in the 2023 Bill and the EM confirms the intention is that the meaning of these terms is to be left to general law.[47] Relevantly, the Macquarie Dictionary defines 'undue' as:

> 1. unwarranted; excessive; too great: *undue haste*
> 2. not proper, fitting, or right; unjustified: *exert undue influence.*[48]

49. The EM for the 2023 Bill indicates that the:

> *The purpose of criminalising coercion, undue influence and undue pressure in this offence is to target conduct that may be characterised as excessive, unfair or exploitative*.[49]

50. It is questionable whether the term 'undue' is required in this context, given that in order for conduct to amount to an offence, the employer must know or be reckless to the fact that the proposed work arrangement will result in either:

- the visa holder breaching a work-related condition; or
- believing that the employer will take an action which has an adverse effect on their immigration status by reporting them to the Department or withholding information they are obliged to provide to the Department.

[47] Ibid [21]. The Law Council considers that proposed sections 245AAA, 245AAB and 245AAC of the 2023 Bill are distinct from section 344 of the *Fair Work Act 2009* (Cth), which uses similar language of 'exert undue influence or undue pressure' but is a civil penalty provision with different other elements.
[48] *Concise Macquarie Dictionary*, (8th ed) 'undue'.
[49] EM for the 2023 Bill [22].

51. Arguably, if the prospective employer *knows* that the proposed work arrangement will have those results, *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.

52. 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'.

53. 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, or is reckless in relation to whether, the work arrangement will put an employee in breach of a work-related condition or create a belief that the employer will take an action which has an adverse effect on their immigration status;
- a potential argument that the concept of 'intentional undue influence / pressure' necessarily requires knowledge that the degree of influence or pressure is 'undue'; and
- an implication may be drawn that influence or pressure cannot be proven to be 'undue' merely because the employer knows or is reckless to the fact that the proposed work arrangement they are actively trying to entice the employee to accept would breach the employee's work-related visa condition, or cause them to believe that the employer will take an action which has an adverse effect on their immigration status—i.e. that something additional is required.

54. The Law Council suggests these three provisions should be simplified so that they are directed to capturing the intent to overbear on the migrant worker to accept a work arrangement against their interests which gives rise to the potential for exploitation.

55. In relation to section 245AAA, this may be done by simply removing the word 'undue' from proposed paragraph 245AAA(1)(a), so the offence is effectively an employer who coerces or exerts pressure or influence on a person to agree or accept a work arrangement which they either they know will result in the worker breaching a visa condition or are reckless to that fact.

56. In relation to proposed sections 245AAB and 245AAC, the Law Council does not support the inclusion of an offence provision that depends on proving the subjective belief of the recipient which has resulted from the coercion, pressure or influence. This drafting is unusual. The Law Council suggests the drafting of this provision should be directed towards the threat that sits behind the coercion, pressure or influence: that is, to accept a work arrangement or instead be reported to the Department and thus detained, deported or be unable to apply for a visa. The Law Council recommends these provisions be redrafted so they are directed to criminalising the *intention/recklessness* as to the employee's belief that they must agree to the arrangement to avoid an adverse outcome, rather than whether the belief actually arises.

57. The unwarranted demand offences in Part 7.5 of the Criminal Code may provide a potential model for such a provision.

Civil penalty provisions

58. The 2023 Bill notes that the new provisions will be subject to section 486ZF of the Migration Act, which provides that, in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision in the Act, it is not necessary to prove the state of mind of the person. This is subject to a mistake of fact exception, in section 486ZE. However, that exception would not be available to an employer who simply did not turn their mind to the issues and made a mistake but did not have the necessary intent. This is inconsistent with offences or penalties—criminal or civil—being based on the intention of the employer.

59. The Law Council suggests thought be given to how proposed sections 245AAA, 245AAB and 245AAC, if amended in the manner that the Law Council suggests, would apply as civil penalty provisions.

Recommendation

- **Proposed sections 245AAA, 245AAB and 245AAC be amended so they no longer contain an initial limb which includes the qualifier 'undue'.**
- **Proposed section 245AAA, be amended to remove the word 'undue' from proposed paragraph 245AAA(1)(a).**
- **Proposed sections 245AAB and 245AAC, be redrafted so they are directed to criminalising the *intention* to cause the worker to believe that they must agree to the arrangement to avoid an adverse outcome, rather than whether the belief actually arises**.

Other complementary measures related to unlawful non-citizens

60. There is a reported reluctance[50] by undocumented workers to report exploitative behaviour for fear of detention[51] and removal from Australia as soon as reasonably practicable.[52]

61. The Law Council considers it in the public interest for non-citizens to be lawful—that is, hold a visa, as opposed to being unlawful in the community. Being unlawful can have a significant impact on a person's mental health. An unlawful non-citizen will not have work rights or social supports (such as Medicare) and is therefore vulnerable to poverty and workplace exploitation.

62. A number of complementary measures could assist to regularise the status of unlawful non-citizens in the community.

63. These include:

    - a temporary amnesty to enable employed unlawful non-citizens to apply for a visa within a bespoke visa framework which provides a pathway to a

[50] Laurie Berg, Bassina Farbenblum and Sanmati Verma (Migrant Justice Institute), 'Breaking the Silence – A proposal for whistleblower protections to enable migrant workers to address exploitation' (February 2023) 9 https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/64010cb82e0bd4510e01c6a3/1677790407417/Feb+23+Breaking+the+Silence+Proposal+for+Whistleblower+Protections.pdf.
[51] Migration Act section 189.
[52] Ibid section 198.

permanent visa if they maintain their employment with a designated employer or within a designated industry for a particular period;[53] and

- resolving several other disincentives within the Bridging visa framework that may apply to an unlawful non-citizen seeking to regularise their status, which may mean that they form the view that it is not in their interest to report to the Department.[54]

64. More broadly, the Law Council suggests consideration be given to the contribution made by the statutory visa application bars[55] and the mandatory detention regime in contributing to the causes of persons becoming unlawful non-citizens and their reluctance of such persons to regularise their status.

65. The Law Council considers that substantial reforms are required to ensure that the immigration detention regime under the Migration Act is consistent with rule of law principles and international obligations. These are discussed in detail in a recent submission.[56] Relevantly, two fundamental elements of these reforms are that the immigration detention regime should:

- be based on a presumption that a person will not be detained, other than for a minimal initial period of detention to conduct initial health, identity and security checks; and
- once a person is detained, oblige the Minister (or official) to consider whether a person should be detained subject to clear criteria directed at considering whether detention is 'reasonable, necessary and proportionate in light of the circumstances', consistent with the principles articulated under international law.

Consistency with other offence provisions

66. The Law Council recommends consideration be given to whether the civil penalty and offence provisions in existing sections 245AR and 245AS would operate consistently with the proposed new sections 245AAA, 245AAB and 245AAC.

67. A person will contravene sections 245AR and 245AS respectively, if:

- they ask for, or receive, a benefit from another person in return for the occurrence of a sponsorship-related event; or
- they offer to provide, or provide, a benefit to another person in return for the occurrence of a sponsorship-related event.

[53] During its appearance before the Joint Standing Committee on Migration in relation to its 'Migration, Pathway to Nation Building' inquiry on 12 May 2023, the Law Council was asked whether it had considered solutions for long term-term unlawful non-citizens working in Australia and took the question on notice. It anticipates that its supplementary submission responding to this question may be published in due course.
[54] Such measures are also included in the response referred to in the previous footnote. If that response is not published, the Law Council would be pleased to provide further details on this point if it would be of interest to the Committee.
[55] That is: 46A and 46B, 48 and 48A of the Migration Act.
[56] Law Council submission to the Parliamentary Joint Committee on Intelligence and Security, 'Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth)' (4 July 2013) [49]-[53] https://lawcouncil.au/publicassets/544bf606-ff1a-ee11-9484-005056be13b5/4379%20-%20S%20-%20Review%20of%20the%20Migration%20Amendment%20%20CIOR%20%20Act.pdf.

68. A ‘sponsorship-related event’ is defined in section 245AQ of the Migration Act and includes, amongst other things, ‘a person becoming, or not ceasing to be, a party to a work agreement’.

69. Sections 245AR and 245AS provisions only apply to sponsored visas—a subset of the visa types that would come within the operation of sections 245AAA, 245AAB and 245AAC.

70. Nevertheless, it is conceivable, for example, that an employer who offers to provide a benefit to a temporary visa holder or applicant to accept/agree to a work agreement, could both contravene section 245AS and proposed section 245AAA (by applying undue influence to agree, or accept a work arrangement which would result in the person breaching a work-related condition). The Law Council suggests the Committee inquire whether the application of the existing sections 245AR and 245AS was taken into account in drafting the new offence provisions. The EM for the Bill indicates the proposed offences seek to address ‘gaps in the existing provisions’ and lists a number of existing offence and civil penalty provisions, but not sections 245AR and 245AS.[57]

Prohibited employer declaration scheme

Overview

71. Part 2 of Schedule 1 to the Bill will insert provisions into the Migration Act which will empower the Minister to declare a person to be a prohibited employer for a period specified in the declaration (**prohibition period**).

72. The power is exercisable if the person is subject to a ‘migrant worker sanction’ (as defined within Subdivision E[58]) and became subject to that sanction within five years of the prohibited employer declaration power being exercised.[59] At a high-level, a prohibited employer is prohibited from allowing non-citizens to work (other than a permanent resident).

73. According to the EM for the 2023 Bill:

> *This measure responds holistically to the issues and concerns that underpin Recommendation 20 of the Taskforce Report, which found there were opportunities to extend the existing ‘bar’ available under the Employer Sponsor Framework, which prevents employer sponsors from sponsoring non-citizen employees for work related visas where they have breached their sponsorship obligations.*[60]

74. 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.*

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

[57] EM for the 2023 Bill 84.
[58] Of Division 12 of Part 2 of the Migration Act
[59] Proposed subsection 245AYK(1).
[60] EM for the 2023 Bill, Statement of Compatibility with Human Rights 86.

76. As discussed below, the prohibited employer declaration scheme applies more broadly than Recommendation 20, as it includes persons subject to a number of civil penalty provisions in the Migration Act and Fair Work Act, in addition to persons convicted by a court for matters in addition to underpayment of migrant workers.

77. The proposed scheme will, as recommended by the Migrant Workers' Taskforce Report, apply to employers of temporary non-sponsored visa holders and persons without a visa, 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 this scheme will be a challenge to regulate, and suggests the Department consider compliance tools to monitor prohibited employers beyond the publication of their details.

78. The Law Council considers several improvements could be made to this scheme. In the following passages, the Law Council discusses its views on the following elements of this scheme:

- the consequence of being a prohibited employer;
- the migrant worker sanctions, which may make the prohibited employer declaration power exercisable;
- the process for declaring a person to be a prohibited employer; and
- the application provisions.

Analysis

Consequence of being a prohibited employer

Civil penalty and offence

79. Proposed subsection 245AYL(1) provides that a person who is a prohibited employer[61] contravenes that subsection if they either:

(i) 'allow a non-citizen to begin work';[62] or

(ii) have a 'material role in a decision made by a body corporate or other body to allow a non-citizen to begin work,

if that non-citizen is either an unlawful non-citizen or lawful non-citizen who holds a temporary visa.

80. The 2021 Bill contained two exceptions to this prohibition:

- the work is 'merely incidental' to a business of the person or body corporate;[63] and
- the person engages a non-citizen in a domestic context under a contract for services.[64]

[61] That is, a person in relation to whom a declaration has been made which is in effect: proposed section 245AYD.
[62] Defined extensively in proposed section 245AYC.
[63] Clause 245AYH of the 2021 Bill.
[64] This exception formed part of the definition of 'allows' a person to work – see paragraph 245AYC(2)(b) of the 2021 Bill.

81. Neither exception has been included in the 2023 Bill, and the Law Council supports their omission for the reasons set out in its submission on the 2021 Bill.[65]

82. A person who contravenes proposed subsection 245AYL(1) will be liable to a civil penalty[66] and commits an offence.[67] Intention is the fault element for each limb.[68]

83. The rendering of proposed subsection 245AYL(1) as an offence is new to the 2023 Bill. Contravention of the equivalent provision in the 2021 Bill raised liability for a civil penalty only.

84. The EM for the 2023 Bill explains that:

> *While subsection 245AYL(4) is a civil penalty provision, it is appropriate that a person who contravenes subsection 245AYL(1) is liable to a penalty of 240 penalty units. This penalty aligns with the increased penalties for the current work-related provisions. It also acknowledges the serious circumstances that lead to a person being declared a prohibited employer. It is appropriate that a person who is already the subject of a migrant worker sanction, who then also goes on to contravene subsection 245AYL(1) as a prohibited employer, should be liable to a substantial penalty in relation to that contravention.*[69]

85. The Law Council does not object to this approach.

Migrant worker sanctions

86. As noted, the Minister may declare a person who has become subject to a *migrant worker sanction* to be a prohibited employer.[70] A person is subject to a migrant worker sanction in the following circumstances.

Approved sponsor bar

87. A person would be subject to a migrant worker sanction if they:

- are an approved sponsor subject to a bar imposed by the Minister under paragraphs 140M(1)(c) or (d) of the Migration Act; and
- have either not requested a waiver of the bar or the person has made such a request and the Minister has not waived the bar.

88. 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.

89. The inclusion of an exception for bar waiver requests was not included in the 2021 Bill. The Law Council supports the inclusion of this exception in the 2023 Bill. It suggests consideration be given to expanding the exception to include persons

[65] Law Council submission on the 2021 Bill [128]-[138].
[66] Proposed new subsection 245AYL(4).
[67] Proposed new subsection 245AYL(2).
[68] Proposed subsection 245AYL(3) clarifies that the fault element for proposed subsection 245AYL(1)(b)(ii) is intention by the first person. As proposed section 245AYL does not specify the fault elements for the other limbs, the default fault element, 'intention', applies – see subclause 5.6(1) of The Criminal Code. See EM for the 2023 Bill [248].
[69] EM for the 2023 Bill [251].
[70] Proposed subsection 245AYK(1).

who have sought review of a sponsorship bar decision which has not yet been finally determined by the Administrative Appeals Tribunal (**AAT**).

90. The Law Council notes that:

- in 2021–22, there were 38 decisions on review of 'sponsor cancellation and/or bar decisions' of which nine (24 percent) were set aside, nine (24 percent) were affirmed and 20 (53 per cent) were withdrawn by the applicant;[71] and
- from 1 July 2022 to 31 May 2023, there were 36 decisions on review of 'sponsor cancellation and/or bar decisions' of which 12 (33 percent) were set aside, six (17 percent) were affirmed and 15 (42 per cent) were withdrawn by the applicant.[72]

91. The Law Council has received input that the impact of applying the prohibited employer scheme to employers who are subject to a faulty bar decision which is ultimately overturned by the AAT is potentially significant.

92. It is unclear whether subparagraph 245AYE(1)(c)(ii) captures waiver requests that have not been decided, or only waiver requests that have resulted in a decision not to waiver the bar. This could be made clear through improved drafting.

93. The 2023 Bill also proposes a new power to give a compliance notice to a person they reasonably believe is, or was, an approved work sponsor who has failed to satisfy sponsorship obligations. A failure to comply with a compliance notice is a civil penalty provision and also a migrant worker sanction, which triggers the prohibited employer declaration power.

Convicted of various offences

Work-related offences

94. A person would be subject to a migrant worker sanction if they are convicted of a work-related offence, which would be defined under subsection 5(1) of the Migration Act:[73] proposed subsection 245AFY(1).

Offence against humanity (slavery and human trafficking offences)

95. A person would be subject to a migrant worker sanction under proposed subsection 245AFY(2) if the Minister is satisfied that:

- the person has been convicted of an offence against the following provisions of the Criminal Code:
  - Division 270 (other than section 270.7B or section 270.8 to the extent an offence against that section relates to an offence against section 270.7B) —this captures slavery and slavery-like offences, other than forced marriage offences (being the offence captured by section 270.7B);
  - Division 271 (other than Subdivision BA)—this Division captures offences related to trafficking in persons and harbouring a victim, but not organ trafficking;

[71] AAT, 'MRD caseload summary by subclass For the period 1 July 2021 to 30 June 2022' https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-caseload-statistics-by-subclass-2021-22.pdf.
[72] AAT, 'MRD caseload summary by subclass For the period 1 July 2022 to 31 May 2023' https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Caseload-Statistics-by-subclass-2022-23.pdf.
[73] See item 3 of Schedule 1 to the 2023 Bill.

- the person engaged in the relevant conduct in Australia; and
- the offence related, wholly or partly, to another person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa).

96. The addition of these offences to the definition of migrant worker sanction is new to the 2023 Bill—they were not included in the 2021 Bill. The Law Council generally supports these provisions but raises three queries about some of the limitations to their operation.

97. Firstly, it queries why the operation of this provision is dependent on the Minister forming a state of satisfaction, whereas, in relation to proposed subsection 245AYF(1) (above), no such requirement exists. None of the matters listed in proposed subsections 245AYF(2) and (3) appears to be any more capable of being objectively determined (that is, those matters either exist or do not exist) than the matters listed in subsection 245AYF(1).

98. Secondly, it queries the carve-out of section 270.7B and Subdivision BA of Division 271 of the Criminal Code from the scheme.

99. The EM for the 2023 Bill explains this approach as follows:

> *The inclusions and exclusions support coherence with the overarching focus of the Bill to address the exploitation of temporary migrant workers in Australia.*[74]

100. Under subsection 270.7B(1) of the Criminal Code, a person commits an offence if they engage in conduct which causes another person to enter into a forced marriage as the victim of the marriage. The person does not need to be a party to that marriage themselves—such persons are covered by the separate offence in subsection 270.7B(2) of the Criminal Code.

101. Under subsection 271.7B(1) of the Criminal Code (a provision within Subdivision BA of Division 271), a person (the ***offender***) commits an offence if they:

- engage in conduct consisting of the organisation or facilitation of the entry or proposed entry, or the receipt, of another person (the ***victim***) into Australia; and
- are reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision [contrary to State or territory law or neither consented to nor medically required], by the offender or another person, after or in the course of that entry or receipt.

102. While in both cases (i.e. forced marriage and organ trafficking), the alleged conduct may not necessarily occur in the context of the victim performing work for the offender, both offences relate to the treatment of people as slaves. Further, in both cases, the victim could be—maybe, is likely to be—a temporary visa holder. If a person is convicted of such offences, the Law Council suggests, in contrast to the approach taken in the 2023 Bill, it may in fact be consistent with a scheme directed towards addressing the exploitation of migrant workers to not empower the Minister to declare the person to be a prohibited employer.

[74] EM for the 2023 Bill [188].

103. Finally, the Law Council queries the requirement that the conduct must have occurred in Australia, particularly if this is not required for an offence to be committed under the Criminal Code.

Fair Work Act

104. A person is subject to a migrant worker sanction under proposed subsection 245AFY(3) if the Minister is satisfied that:

    (a) the person has been convicted of an offence against the Fair Work Act, or a relevant workplace law,[75] that is an offence of a kind prescribed by the regulations; and

    (b) the offence related, wholly or partly, to a prescribed person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa); and

    (c) any circumstances prescribed by the regulations apply in relation to the offence.

105. The operation of this proposed new subsection depends entirely on regulations prescribing an offence, the person to whom the offence relates (as a victim), and any related circumstances.

106. The EM explains this approach as follows:

> *The purpose of this regulation-making power is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation, ensuring that the scheme continues to remain fit for purpose in the future. Focusing the scope and application of the power aligns with scrutiny principles and best practice for provision of matters in delegated legislation, and ensures that the regulation-making power is appropriately targeted to achieving the scheme's overarching objectives as a measure under the legislative framework that supports migration, namely the Migration Act.*[76]

107. Notwithstanding that explanation the Law Council queries whether the regulation-making power is indeed 'appropriately targeted'. The only express limit on the regulation-making is that the conduct in question must relate to a person who was at the time a non-citizen (other than the holder of a permanent visa). There are no limits on the kinds of offences that could be prescribed. The Law Council recommends consideration be given to imposing some requirement that before the Governor-General makes a regulation for this purpose, the Minister must be satisfied that prescription of the offence is necessary to serve the purpose of the prohibited employer scheme.

[75] The term 'relevant workplace law' is defined in proposed subsection 245APA(2), as applied to this provision by the definition to be inserted into subsection 5(1) of the Migration Act as a Commonwealth law (other than the Fair Work Act) or State or Territory law that regulates the relationships between the parties to a contract of service, or a contract for services, in relation to the performance of work, including law dealing with occupational health and safety matters and a law dealing with workers' compensation.
[76] EM for the 2023 Bill [192].

Contraventions under the Fair Work Act

108. The 2023 Bill provides that migrant worker sanctions include listed contraventions of the Fair Work Act. The 2023 Bill draws a far greater number of Fair Work Act contraventions into this scheme than the 2021 Bill.[77]

109. In the time available, the Law Council has not had an opportunity to analyse the implications of adding these additional Fair Work Act contraventions. Such implications could conceivably arise in relation to the operation of the Fair Work Act (and compliance activity undertaken under that Act) or the prohibited employer declaration scheme itself. The Law Council suggests that the Committee should satisfy itself that the expansion of this scheme in this way is reasonable and proportionate.

Nature of the power to declare

110. Before making a prohibited employer declaration, the Minister must:

- send a written notice to the person 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;[78]
- in making a decision, consider any submission made by the affected person and any criteria prescribed in the regulations;[79] and
- 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, and remains in effect until the end of the period set out in the declaration.[80]

111. The decision to make a prohibited employer declaration is reviewable by the AAT.[81]

112. Like the 2021 Bill, the 2023 Bill does not:

- set out any criteria that apply to the Minister's decision to make a prohibited employer declaration—the Minister would instead be obliged to consider 'any criteria' prescribed by the regulations; nor
- provide any guidance or impose any requirements as to the length of time a declaration may have effect—the Minister may set a period as long or as short as he or she deems fit.

113. 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.

[77] The new Fair Work Act provisions added to the definition of 'migrant worker sanction' in the 2023 Bill include: paras (f)-(i) and (m)-(q) of the definition of 'relevant fair work provision' proposed section 245AYB; and proposed subsections 245AYH(3)-(6).
[78] Proposed subsections 245AYK(3) and (4).
[79] Proposed subsection 245AYK(5).
[80] Proposed subsections 245AYG(6)-(8).
[81] Proposed subsection 245AYK(9).

Criteria for making a decision to declare a prohibited employer

114. As discussed above, the prohibited employer declaration power may be exercisable in relation to employers who have breached a vast array of civil penalty provisions in the Fair Work Act and Migration Act, or have been convicted of offences under the Fair Work Act, Migration Act and Criminal Code. It would assist both 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 making a prohibited employer declaration.

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

116. Firstly, it is not mandatory for such criteria to be prescribed—the obligation is to consider '*any* prescribed matter' (emphasis added).

117. Further, the Senate Standing Committee for the Scrutiny of Bills 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.[82]

118. Those Guidelines suggest that 'leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes'.[83]

119. The criteria for a power to declare a person to be a prohibited employer is a 'significant element of a legislative scheme'—it limits the scope of a power the Minister has to prohibit a person from employing temporary visa holders. The effect of a prohibited employer declaration on a person may be significant, as it could directly affect their livelihood.

120. There is no guidance on the face of the legislation to limit the regulations that may be made 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 must be consistent with the Act.[84] It is a principle of the rule of law that the scope of delegated authority should be carefully confined.[85]

121. The criteria which may be prescribed under this power are addressed in the EM for the 2023 Bill as follows:

> *Without limiting what might be prescribed, such criteria might relate to matters such as:*
>
> - *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), recognising the underlying intent is to protect additional temporary migrant workers from employers found to have engaged in serious,*

[82] Australian Senate, Senate Standing Committee for the Scrutiny of Bills, 'principle (iv): whether a Bill inappropriately delegates legislative powers' https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/Guidelines/Principle_iv_guideline__inappropriate_delegation_of_legislative_powers.pdf?la=en&hash=B78277992E1A53189D2414B26EDB2E24FF8BBEB5.
[83] Ibid 2.
[84] Subsection 504(1) of the Migration Act.
[85] 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>.

deliberate of repeated non-compliance in their treatment of temporary migrant workers; or

- *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.*

By providing for the criteria to be prescribed by the Regulations, this ensures appropriate ability to review and adjust the criteria as needed, while also ensuring that there is appropriate parliamentary oversight. The Regulations would be subject to disallowance.[86]

122. The EM states the prohibition will only be available in the 'most serious' cases.[87]

123. Based on this extract from the EM, the intent appears to be the prohibited employer declaration power will be exercised when employers 'have engaged in serious, deliberate or repeated non-compliance in their treatment of temporary migrant workers'. However, as a matter of law, statements about how it is intended that the Governor-General will exercise a delegated power made in an EM have limited weight with respect to how the power may be validly exercised.

124. There is nothing on the face of the legislation that gives effect to that intent. The Law Council submits that Parliament should have an opportunity to consider whether that intent is appropriate and, if so, to oversee amendments which will provide for that intent to be given effect.

125. The Law Council recommends the Bill be amended so that the power of the Minister in proposed subsection 245AYK(1) to declare a person to be a prohibited employer is subject to consideration of, at the very least, the following mandatory factors: the time since the original sanction was imposed; the seriousness of the conduct and whether it amounts to a pattern of conduct; co-operation with a regulator in relation to the original sanction; and the steps taken since the original sanction to remedy the conduct.

126. The EM 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'.[88] However, the Scrutiny of Bills Committee guideline provides that the '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.

127. Finally, if a decision is made to retain the power to prescribe criteria in regulations, the Law Council recommends any draft regulations be subject to public consultation.

Recommendations

- **The Bill should be amended so that the criteria relevant to the Minister's decision to make a prohibited employer declaration are prescribed in primary legislation.**

[86] EM for the 2023 Bill [235]-[236].
[87] Ibid Statement of Compatibility with Human Rights prescribed in Attachment A 95, 99, 100.
[88] Ibid [235].

- **If this recommendation is not accepted, the Bill should be amended so that the power to make regulations is confined by guidance in primary legislation as to the kinds of matters that may be prescribed**

Period of the employer declaration power

128. There is no statutory limit or guidance on the length of the period for which a Minister may or must declare a person to be a prohibited employer. The length of that period is not 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.

129. The EM states:

> *This provision does not include a limit on the period for which a declaration has effect. 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. Matters raised by the person in their written submission to the Minister under new subsection 245AYK(3) may also be taken into account in determining the declaration's period of effect.*[89]

130. 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 that the 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.

131. Further, an open discretion to impose a period of any length is inconsistent with the intent suggested in the EM 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 unbounded discretion to make a declaration of any length.

132. 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 that 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 this prohibition could be applied.

Recommendation

- **The 2023 Bill should 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 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.**

[89] Ibid [240].

Potential adverse impact on migrant workers

133. A person declared to be a prohibited employer will be prohibited from employing *new* migrant workers. This is reflected in the language of 'allows a non-citizen to begin work' in proposed subsection 245AYL(1), as that term is defined in proposed section 245AYC.

134. As a result, the 2023 Bill will not operate to prohibit a person already working for a prohibited employer under a temporary employer sponsored visa. The Law Council supports this approach given the impact on those visa holders of having to find a new employer sponsor, particularly given there is not currently a workplace justice visa or similar to be granted in such circumstances.

135. The EM states:

> *The purpose of new subsection 245AYL(1) is to prevent a person who is a prohibited employer from allowing additional non-citizens to begin work. This is not intended to prevent a non-citizen who has an established work relationship with the person—before that person is declared to be a prohibited employer—from continuing to work for the employer.*[90]

136. There may, however, be an adverse impact on a person holding a Subclass 482 (Temporary Skills Shortage) visa (**TSS visa**) and seeking to apply for a Subclass 186 (Employer Nomination Scheme) visa (**ENS visa**) with the same employer.

137. It is a requirement of a nomination for an ENS visa[91] and the ENS visa itself,[92] that there is no adverse information known to the Department about the nominating employer or, if there is, it is reasonable to disregard that information. A prohibited employer declaration could constitute adverse information about the employer known to the Department, leading to an applicant's ENS visa application being refused. Practitioners have pointed out that the 'adverse information' requirement is actually a disincentive to reporting exploitation.

138. The Law Council queries whether the intention is that a prohibited employer declaration will prohibit a migrant worker from being sponsored by that employer for a permanent ENS visa. If that is not the intention, the Law Council suggests further amendments are required—specifically, to ensure that a TSS visa holder who is employed by an employer at the time that employer is declared a prohibited employer, who later seeks to be sponsored by that employer for an ENS visa, is quarantined from the 'adverse information' criterion. This could be achieved by changing the definition of adverse information, or by ensuring that policy (for example, the Department's Procedurals Advice Manual) makes it clear this is an example of where such information is reasonable to disregard.

139. The Law Council has separately noted that the effective requirement on a TSS visa holder to stay with their employer for three years, so as to remain on a pathway to permanent residency, acts as a disincentive to TSS visa holders leaving their employer or reporting poor conduct, even if the conditions of their employment are poor or exploitative. That is because changing employers will restart the minimum

[90] EM for the 2023 Bill [245].
[91] Migration Regulations paragraph 5.19(4)(b).
[92] For example, ibid Schedule 2 subclause 186.223(3A).

three-year pathway that currently exists to permanent residence and thus prolong their temporary visa status.[93]

140. The Law Council has recently recommended that temporary visa holders be given more flexibility to change employers without that affecting their pathway to permanent residence.[94]

Application and retrospectivity

141. The relevant migrant worker sanctions that trigger the availability of the employer declaration power can relate to conduct that occurred before the commencement of these provisions, albeit in relation to sanctions imposed after commencement.[95]

142. The Law Council has some misgivings about the new prohibited employer declaration power being applicable essentially as a result of conduct that predated the commencement of the provisions. While it may be the case that there were provisions that 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.

143. 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.[96]

144. 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.

Recommendation

- **Consideration should be given to amending the Bill so that a prohibited employer declaration may only be made in relation to conduct that post-dates the commencement of the provisions making up the scheme.**

Introduction of enforceable undertakings and compliance notices

145. Part 4 of Schedule 1 to the 2023 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**).

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[93] See also, making the same point: Australian Industry Group, 'Submission to the inquiry: A Migration System for Australia's Future' (15 December 2022). https://www.aigroup.com.au/globalassets/news/submissions/2022/inquiry_into_migration_system_dec_2022.pdf; Chris F. Wright and Stephen Clibborn (University of Sydney), 'Submission, Department of Home Affairs Review: A Migration System for Australia's Future' (December 2022) 16.

[94] Law Council of Australia, Submission to the Joint Standing Committee on Migration, 'Migration, Pathway to Nation Building' (31 March 2023) [30]-[40] https://lawcouncil.au/publicassets/e96123eb-04d4-ed11-947b-005056be13b5/2023%2004%2003%20-%20S%20-%20%20Migration%20-%20Pathway%20to%20Nation%20Building.pdf.

[95] 2023 Bill Division 2 of Part 2 of Schedule 1.

[96] 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>.

146. 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.[97] These undertakings are enforceable by court order.[98]

147. Part 5 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 the contravention of a 'conduct rule provision'.[99] Failure to comply with a compliance notice is a civil penalty provision.[100]

148. The Law Council approves the use of these flexible compliance tools for low-level offending, as a means to promote compliant conduct.

Retrospective operation

149. Items 27 and 36 of Schedule 1 respectively provide that enforceable undertakings and compliance notices may be given in relation to conduct (including an omission) engaged in before, on or after the commencement of those items.

150. The application of enforceable undertakings to conduct preceding the commencement of that item is a change from the 2021 Bill, in which enforceable undertakings could only be given in relation to conduct occurring after commencement.[101]

151. Notably, there appears to be an error in the description of item 27 in the EM. Specifically, the EM suggests item 27 'clarifies that Part 6 of the Regulatory Powers Act applies in relation to undertakings given on or after the commencement of the Schedule to the Bill'. Respectfully, that is not what item 27 provides. The Law Council suggests the Committee make inquiries as to whether the error is in item 27 or in the description of the item in the EM.

152. The Law Council queries the retrospective application of both of these schemes. By way of explanation for the compliance notice scheme applying to conduct occurring before the commencement of Schedule 1, the EM states:

> *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.*[102]

153. The Law Council's view is that laws imposing additional obligations and consequences should be prospective unless appropriately justified.

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

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[97] Section 114 of the RPA.
[98] Ibid section 115.
[99] Proposed subsections 245AYP(1) and (2) of the 2023 Bill.
[100] Ibid proposed subsection 245ALB(5).
[101] 2021 Bill item 37 of Schedule 1.
[102] EM for the 2023 Bill [440].

155. However, as noted in the EM, the compliance notice scheme will apply to new offences introduced by the Bill. The EM does not appear to provide sufficient explanation for a retrospective approach in those circumstances, and the Law Council suggests that consideration be given to amending item 36, to provide that it does not apply to conduct occurring before the commencement of the new offences and civil penalty provisions.

Recommendation

- **The Committee should enquire as to whether item 27—or the description of that item in the EM—is incorrect, and amendments should be made to address the error.**
- **A more detailed explanation should be provided to justify the retrospective application of the compliance notice scheme (and the enforceable undertakings, if that is intended) to the new offences and civil penalty provisions. If the approach is not expected to operate beneficially, these Parts should not operate retrospectively in relation to the new offences and civil penalty provisions**.

Amendments to be made by Part 6 to Schedule 1

New power to prescribe matters relevant to a cancellation decision

156. Item 37 of Schedule 1 to the 2023 Bill would repeal subsection 116(1A) of the Migration Act, which provides that:

> *[t]he regulations prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in paragraph (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.*

157. Paragraph 116(1)(fa) of the Migration Act empowers the Minister to cancel a visa if he or she is satisfied that a student visa holder is not, or is likely not to be, a genuine student or has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa. These matters are prescribed in reg 2.43 of the *Migration Regulations 1994* (Cth).

158. In its place, item 37 would insert a new subsection 116(1)(1A) which would provide that regulations may be made which:

- prescribe matters to which the Minister must or must not,[103] or may,[104] have regard in determining whether the Minister is satisfied that a ground exists for cancelling the person's visa; and
- specify the weight to be given to matters so prescribed.[105]

159. The EM describes the purpose of this provision as follows:

> *For example, this will allow measures such as the Assurance Protocol, which is an administrative arrangement between the [Fair Work Ombudsman] and the Department, to be codified in the regulations. Codifying the Assurance Protocol*

[103] Proposed paragraph 116(1A)(a) of the 2023 Bill.
[104] Ibid proposed paragraph 116(1A)(b).
[105] Ibid proposed paragraph 116(1A)(c).

will give additional assurance to migrant workers that they can seek help without fear of visa cancellation, even if they have breached their work-related visa conditions. The terms and conditions of the Assurance Protocol are subject to consultation before they are prescribed under new subsection 116(1A) to ensure they are holistic and robust, while maintaining visa program integrity.[106]

For example, the Government may prescribe certified evidence of exploitation in the workplace to be taken into account by the Minister or delegate when considering whether or not to cancel a visa, with the intention that it be a reason for the visa of the non-citizen who has been exploited not to be cancelled.[107]

This amendment follows stakeholder feedback that the Assurance Protocol (a commitment between the Department of Home Affairs and Fair Work Ombudsman that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met) is not trusted amongst exploited migrant workers. Using this new enabling power, the Government will be able to reflect the intent of the Assurance Protocol in the Migration Regulations—that is, to prescribe matters to be taken into account to ensure that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met. This would provide greater transparency about the protections available to visa holders who want to report their employers for exploitative work practices. The application of these protections will be carefully developed to ensure an appropriate balance can be achieved that protects migrant workers without unduly damaging the integrity of visa programs. [108]

160. The Assurance Protocol is an administrative arrangement between the Fair Work Ombudsman (**FWO**) and the Department. According to the Department's website:

> *Under the Assurance Protocol, we won't cancel your visa if you have breached your work-related visa conditions because of workplace exploitation, provided:*
>
> - *you have sought advice or support from the FWO and you're helping them with their inquiries*
> - *there is no other reason to cancel your visa (such as national security, character, health or fraud)*
> - *you have committed to following your visa conditions in the future.*[109]

161. Under the current law, it is difficult to see how the Assurance Protocol can be given effect to the level of confidence suggested in that passage.

The Bill will not achieve its objective

162. The passage from the EM, quoted above, suggests that the amendments will 'ensure' that a visa will not be cancelled if certain evidence of migrant worker exploitation is furnished, as intended by the Assurance Protocol.

163. The amendments will not have this effect, for three key reasons:

(a) the regulations will be directed to the wrong aspect of the cancellation power;

(b) the regulations cannot bind the Minister; and

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[106] EM for the 2023 Bill [442].
[107] Ibid 'Statement of Compatibility with Human Rights' 92.
[108] Ibid 'Statement of Compatibility with Human Rights' 93.
[109] Department, 'Workers rights and visa protections' (website, accessed on 26 July 2023) https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation.

(c) the empowering provision is not directed towards ensuring the apparent intended outcome.

The regulations will be directed to the wrong aspect of the cancellation power

164. Section 116 of the Migration Act in effect has two steps:

- the Minister forms the state of satisfaction in that one of the matters listed in subsections 116(1)–(1AC) exists; and
- the Minister then exercises their discretion to cancel the visa.

165. Proposed new subsection 116(1)(1A) would enable the Minister to prescribe matters relevant to the Minister forming the relevant state of satisfaction.

166. Take the example of paragraph 116(1)(b) of the Migration Act, which provides that the Minister may cancel a visa if he or she is satisfied that 'its holder has not complied with a condition of the visa'. (This is the example cited in the EM passage quoted above.) That is:

> *Using this new enabling power, the Government will be able … to prescribe matters to be taken into account to ensure that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met.*

167. In circumstances where a person has indisputably not complied with a condition, even if the visa holder is able to provide compelling evidence that the failure to comply with the condition was solely due to migrant worker exploitation to which they were subject, it is difficult to see how a regulation could be made that would enable the Minister to not form the state of satisfaction that the condition had been breached. That would be the case, even if the regulation in question provided that the Minister must consider evidence of migrant worker exploitation and give it significant consideration.

168. To operate in a manner along the lines that the EM suggests, the regulations would need to prescribe matters relevant to the second step: the Minister's discretion to cancel.

The regulations cannot bind the Minister

169. Further, the most the regulations could do under this power is to *require* the Minister to have regard to evidence of migrant worker exploitation and give it *significant* weight. It could not actually compel the Minister to exercise the discretion in one way or another.

170. Subsection 504(1) of the Migration Act relevantly provides that the Governor-General 'may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed'.

171. Proposed subsection 116(1A) would permit the Governor-General to make regulations prescribing matters to which the Minister must or must not, or may, *have regard* in determining whether they are satisfied of the matters which enliven their cancellation power. It would not permit regulations to be made which *require* the

Minister to form a certain state of satisfaction or exercise the discretion one way or another.[110]

172. Proposed subsection 116(1B) of the Migration Act, if enacted, would further provide that the regulation-making power would not limit the matters to which the Minister may have regard in exercising that power. That provision affirms that the regulations made under proposed subsection 116(1B) could not quarantine the consideration of any other matter the Minister considers relevant.

173. In the experience of practitioners, in cancellation proceedings, it is common for a matter to be afforded 'significant' favourable weight by a decision-maker, while the overall balance of discretionary factors weighs against a visa-holder.

174. The LIV considers that visa holders should not be placed in a position where they may find their visa at risk of cancellation if they were to come forward about circumstances of workplace exploitation. The LIV emphasises that it is important that unscrupulous employers should not be able to rely on the threat of visa cancellation to compel visa holders into accepting sub-standard conditions at work.

175. The LIV considers that, unless there is a *guarantee* against cancellation in those circumstances, in the experience of its members, visa holders will not accept the risk and will not pursue workplace claims, preferring their visa security instead.

176. The Law Council agrees that migrant workers who make credible reports of workplace exploitation should not, for reason of that report, face cancellation of their visa.[111]

The empowering provision is not directed towards ensuring the apparent intended outcome

177. Finally, and in any event, while it may be intended that the provisions in the Assurance Protocol will be codified, there is nothing in proposed subsection 116(1A) that will ensure it. The regulation-making power is entirely open-ended. Nothing in its terms directs it to this intended function. Even if regulations are made soon after the passage of the 2023 Bill, they could be repealed in the future without consequence. Further, regulations could be made under that power which would have the opposite effect.

178. If it is intended that regulations with a particular content are to be made under a head of power akin to proposed subsection 116(1A), the head of power should expressly require it.

Preferred approach

179. With thanks to the LIV for this proposal, the Law Council recommends that, instead of the proposed approach, regulations could prescribe the circumstances in which a visa is not to be cancelled under subsection 116(2) of the Migration Act. That subsection provides that

> *The Minister is not to cancel a visa under subsection (1) if there exist prescribed circumstances in which a visa is not to be cancelled.*

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[110] In *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1; 292 ALR 243; [2012] HCA 46, French CJ noted at [54] in relation to subsection 504(1) of the Migration Act that '[e]ven without that expressed constraint delegated legislation cannot be repugnant to the Act which confers the power to make it'.
[111] Law Council submission on the 2021 Bill [6].

180. This would plainly be an existing means through which (to quote from the EM again):

> *the Government will be able … to prescribe matters to be taken into account to ensure that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met.*

Concerns with the Assurance Protocol

181. The Law Council understands that the Assurance Protocol has been subject to the following criticisms:

- it is available only to workers who are helping the Ombudsman with its inquiries—this means that it will not be available to exploited workers where the Ombudsman is not making further inquiries due to, for example, what they perceive as inadequate evidence or lack of agency resources;[5]
- the process for accessing the protection is opaque, and there is only an internal appeal to a team leader at the Ombudsman; and
- there is uncertainty about whether it extends to temporary visa holders without work rights.

182. The LIV advises that its members are concerned that, even if an expanded version of the Assurance Protocol were 'codified', the protection provided would remain severely restricted to matters within the FWO's remit. The Assurance Protocol cannot extend to, for example, work health and safety breaches, discrimination matters, or breaches of labour hire licensing laws—matters that fall outside of the FWO's remit. As such, a codified Assurance Protocol would still not be available to workers who sought to address their exploitation through union action, court action, or the Fair Work Commission.

Repeal of existing offence provisions

183. Item 39 of Schedule 1 to the 2023 Bill would repeal section 235 of the Migration Act, which presently, relevantly, provides that a person would commit an offence if:

- the person contravenes a prescribed condition restricting the work that the non-citizen may do in Australia;[112] and
- the person is an unlawful non-citizen performs work in Australia whether for reward or otherwise.[113]

184. The EM explains the rationale for this amendment as follows:

> *The repeal of current section 235 of the Migration Act is intended to have the principal effect of preventing an employer from arguing that a migrant worker is not entitled to the same workplace protections as other workers in Australia because of their immigration status or right to work, and to encourage increased reporting of employer non-compliance with workplace laws (exploitation). The existence of section 235 has resulted in findings that certain contracts for or of service entered into by migrant workers are void for illegality and thereby enabling some employers to abrogate their obligations to provide safe and fair workplaces. Section 235 has also been cited as a reason temporary migrants refrain from reporting exploitation in the workplace*

[112] Migration Act subsection 235(1).
[113] Ibid subsection 235(3).

185. The Law Council supports the repeal of this provision as a measure consistent with other measures in the 2023 Bill directed toward mitigating the circumstances in which migrant worker exploitation may arise.

186. As noted above, there are already severe migration related consequences for:

- A person who is found to have contravened a prescribed condition restricting the work that the non-citizen may do in Australia—in the form of visa cancellation; and
- an unlawful non-citizen whose unlawful status is detected by the authorities—in the form of mandatory immigration detention.