Law Council
OF AUSTRALIA

Exposure Draft Migration Amendment (Protecting Migrant Workers) Bill 2021

Department of Home Affairs

24 August 2021

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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

Acknowledgement

The Law Council of Australia is grateful for the assistance of the Law Society of New South Wales (including its Human Rights Committee), the Queensland Law Society, the National Criminal Law Committee and the Federal Litigation and Dispute Resolution's Migration Law Committee and Industrial Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) thanks the Department of Home Affairs (**Department**) for the opportunity to provide a submission on its Exposure Draft of the Migration Amendment (Protecting Migrant Workers) Bill 2021 (**Bill**).

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

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

4. The Law Council recognises that threats of visa cancellation (and possible detention and removal as a result) because a worker has breached visa conditions or received threats to withhold evidence of work and other adverse consequences as identified by the Context Paper accompanying the Draft Bill (**Context Paper**), are particularly challenging issues which should be addressed through greater legislative protections.

5. The Law Council considers the proposals in the Bill are good faith attempts to give effect to the recommendations in the Taskforce Report, although considers some improvements to the Bill and certain practical measures are required.

6. Specifically, in summary, the Law Council:

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

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

Regarding the engagement with migrant workers

- suggests the Department consider measures to encourage migrant workers to make complaints and support them in that process, and provide an update on the review of the Assurance Protocol with the Fair Work Ombudsman (**FWO**);

Regarding the prohibited employer declaration scheme

- generally supports the introduction of the prohibited employer declaration scheme;
- suggests consideration be given to a number of proposed drafting improvements;

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

- generally supports the establishment of civil penalty provisions to require a person to use the Visa Entitlement Verification Online system (**VEVO**) system to determine a person's visa status before starting to allow a person to work or referring them to work; and
- suggests, however, that the Department ensure VEVO will publish all the information reasonably required to determine a person's visa status.

Overview of the measures in the Bill

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

8. Specifically, in summary, the Bill will:

   - create offences and civil penalties for prohibited conduct in which a person *coerces, or exerts undue influence or undue pressure on* a non-citizen to accept or agree to a work arrangement, either which will breach visa conditions or in order to avoid an adverse outcome (**coercion and undue influence prohibitions**);

   - increase the penalties which apply to existing 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;

   - create a new power for the Minister to declare a person who has contravened a work-related requirement involving migrants to be a 'prohibited employer' and provide for civil penalties if a 'prohibited employer' employs additional non-citizens (**prohibition declaration scheme**);

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

   - introduce certain regulatory functions relating to the enforcement of work-related offences and provisions in the Migration Act, including enforceable undertakings and compliance notices.

New and existing work-related offences and penalty provisions

Content of the law

New offences

9. The new coercion and undue influence prohibitions are expressed in proposed sections 245AAA and 245AAB and summarised in table form in Attachment A.

10. Section 245AAA prohibits a person coercing or exerting undue pressure or influence on a non-citizen to accept or agree to a work arrangement in Australia which either results in the breach of 'work-related condition' or the visa holder reasonably believes would result in the breach of 'work-related condition'.

11. A work-related condition is a condition prohibiting or restricting work by a visa holder in Australia.[1]

12. To commit an offence under section 245AAA, the person must:

[1] Subsection 5(1) of the Migration Act.

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

- either *know* that, or be *reckless* to the risk that, the work arrangement will be a breach of a work-related condition.

13. The state of mind of such a person is irrelevant to their liability for a civil penalty – all that matters is that the contravention has occurred.[2]

14. Section 245AAB prohibits an employer coercing or exerting undue pressure or influence on a visa holder to accept or agree to a work arrangement in Australia which:

    - the visa holder believes they must accept to be able to satisfy a 'work-related visa requirement'; or

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

15. A work-related visa requirement is a requirement under migration law to provide, in connection with a visa or visa application, information or evidence about work the non-citizen has undertaken in Australia.[3]

16. The reference to 'a non-citizen's immigration status under Division 1' is to Division 1 of Part 2 of the Migration Act, which provides that a non-citizen in the migration zone is either a lawful non-citizen (because they hold a visa which is in effect)[4] or is an unlawful non-citizen (because they do not hold a visa which is in effect).[5]

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

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

    - either *know* that, or be *reckless* to the risk that, the visa holder believes that they must accept or agree to the arrangement to satisfy a work-related visa requirement or avoid an adverse effect on their immigration status.

Increase to penalties for new offences

18. The Bill will also introduce pecuniary penalties for the existing offences and increase the civil penalty provisions so that they are equivalent to the offences and civil penalty provisions inserted by the Bill.[6]

New compliance tools

19. The Bill will also introduce certain regulatory functions relating to the enforcement of work-related offences and provisions in the Migration Act. Specifically, it will:

[2] Ibid, section 486ZF.
[3] Proposed subsection 245AAB(5) of the Migration Act as to be inserted by item 4 of Sch 1 to the Bill. .
[4] Section 13 of the Migration Act.
[5] Ibid, section 14.
[6] Items 22-32 of Schedule 1 to the Bill.

- incorporate Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) to enable 'work-related offences' and 'work-related provisions' in the Migration Act to be subject to the enforceable undertaking framework in that Part;

- permit the issuance of a compliance notice to a person an authorised officer reasonably believes that is engaging in, or has engaged in, conduct which would result in a work-related offence or contravention of a work-related provision.

20. A work-related offence is:

- an offence against Subdivision C of Division 12 of Part 2 of the Migration Act, which includes the new coercion and undue influence offences as well as the existing offences in that subdivision which apply when a person allows or refers a non-citizen for work either in breach of visa conditions or who is an unlawful non-citizen; or

- an offence against section 6 of the *Crimes Act 1914* (Cth) that relates to an offence against that Subdivision – which applies to an accessory after the fact; or

- an ancillary offence (within the meaning of the *Criminal Code*)[7] that is, or relates to, an offence against that Subdivision – which applies to attempts to commit an offence, incitement to commit and offence, and conspiracy to commit an offence.

21. A work-related provision is civil penalty provision in either Subdivisions C or E of Division 12 of Part 2 of the Migration Act – Subdivision E is the new scheme of civil penalties related to persons declared prohibited employers by the proposed Bill.

Context

22. According to the Context Paper published by the Department, the new coercion and undue influence prohibitions were introduced to address Recommendation 19 of the Taskforce Report.[8]

23. Recommendation 19 states:

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

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

- persuaded students to work longer hours than permitted (**scenario 1**); or

- persuaded students to accept lower wages on the threat of reporting them for breaching the hours' restriction (**scenario 2**); or

- rationed work and sought other benefits before signing off on completion of the three-month qualifying period applying to working holiday makers who wish to

[7] The Criminal Code, Schedule to the *Criminal Code Act 1995* (Cth).
[8] Department of Home Affairs, Migration Amendment (Protecting Migrant Workers) Bill 2021 EXPOSURE DRAFT – CONTEXT PAPER, < https://www.homeaffairs.gov.au/reports-and-pubs/files/exposure-draft-bill/migration-amendment-context-paper.pdf>, 4.

benefit from a second year on a Working Holiday Maker (subclass 417 and 462) visa (**scenario 3**).[9]

25. Recommendation 19 is effectively dealt with by one of the three coercion and undue influence prohibitions to be introduced by the Bill – specifically, the prohibition on an employer coercing a visa holder to agree to an arrangement that would breach visa criteria, such as working hours longer than permitted (scenario 1).

26. However, while the other two prohibitions are additional to Recommendation 19 itself, they capture conduct also identified by the Taskforce, but which do not come within the scope of the offence proposed in Recommendation 19, namely: a threat to report a breach of a visa requirement which would affect their immigration status (scenario 2) or withholding signature on work until an arrangement is agreed (scenario 3).

Headline comments

New offences and compliance tools are welcome

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

28. The Law Council supports the introduction of pecuniary penalties for the existing offences and existing civil penalties so that they are equivalent to the new offences and civil penalties, which will increase deterrent capability.

29. The Law Council also welcomes the introduction of enforceable undertakings and compliance notices as additional compliance tools for breaches of work-related offences and civil penalty provisions. The Law Council notes that the Taskforce Report recommended the introduction of enforceable undertakings into the *Fair Work Act 2009* (Cth) (**Fair Work Act**), and welcomes the Department taking the proactive approach of also applying them to its work-related regulatory scheme in the Migration Act.

30. The Law Council also notes that Taskforce Report reported that compliance notices were not at that time extensively used by the FWO and that it had been suggested that this may in part be due to the requirement that the specified action remedy the direct effects of the contravention effectively,[10] which 'requires the FWO to prove the contravention and quantify the underpayment before it can issue a compliance notice requiring an employer to repay the underpayment'.[11]

31. The Law Council notes that the compliance notice scheme to be introduced by Part 6 of Schedule 1 to the Bill will not include that feature and instead will simply specify the 'action that the person must take, or must refrain from taking, to address the conduct'.[12] The Law Council supports this approach.

Increased enforcement efforts are required

32. The Law Council has received feedback from practitioners and its constituent bodies that while additional offences and increased penalties are important, increased investment and appetite for meaningful enforcement action in relation to the laws which

[9] 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>, 123 and 20.
[10] Ibid, 89
[11] Subsection 716(2) of the *Fair Work Act 2009* (Cth).
[12] See proposed 245ALB(2), proposed to be inserted into the Migration Act by item 38 of Schedule 1 to the Bill.

already exist is required to achieve the public policy goals of reducing exploitation and abuse of temporary visa holders.

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

34. Information provided by the Department under the *Freedom of Information Act 1982* (Cth)[13] suggests that there were three investigations conducted in relation to the offence and civil penalty provisions in relation to work by non-citizens and sponsored visas in Subdivisions C and D of Part 12 of the of the Migration Act in the 2019-2020 and 2020-2021: two were terminated and one resulted in an infringement notice.

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

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

Recommendation

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

Greater support and resources for complainants

37. The Law Council has received feedback from several practitioners that further measures are required to encourage or facilitate visa holders coming forward to report exploitation before a person's visa is cancelled for a breach of work conditions, as to do so may cause immediate detriment to their visa status. This is further explored in the later discussion about the prohibited employer scheme, which may further exacerbate this problem.

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

39. The Law Council understands that the Federal Circuit Court is currently largely reliant on the services of volunteer mediators in assisting to resolve small wage claims in the court. It has been reported to the Law Council that employees often have difficulty in

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

accessing court forms and there is often considerable delay in the Federal Circuit Court's ability to deal with matters.

40. This issue was discussed at length in the Taskforce Report, with a recommendation that the Australian Government commission a review of the Fair Work Act to examine how it can become a more effective avenue for wage redress for migrant workers.[14]

41. The Law Council supported[15] the amendments to the Fair Work Act which were initially to be made by Schedule 5 to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 to permit referral of a small claim before a Court to the Fair Work Commission for conciliation, and, where the parties agree, arbitration.

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

43. The Law Council submission to the Senate Standing Committees on Education and Employment in respect of that Bill also noted that the capacity of the Fair Work Commission to resolve claims would be further enhanced if the Fair Work Commission could not only conciliate but also arbitrate such claims (other than with the permission of the parties).[16]

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

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

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

47. Recommendation 21 of the Taskforce Report, which was published in March 2019, recommends that the FWO and the Department review, within 12 months, the effectiveness of the Assurance Protocol. The Context Paper suggests that recommendation will be addressed separately. It is unclear whether the review has occurred or is ongoing.

48. The Law Council has received feedback that:

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

[14] Professor Allan Fels AO and Professor David Cousins AM, n 9, 93-97.
[15] Law Council of Australia, *Submission to the Senate Standing Committees on Education and Employment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, 5 February 2021, <https://www.lawcouncil.asn.au/publicassets/6e68dce7-5c6b-eb11-9439-005056be13b5/3955%20-%20Fair%20Work%20Amendment%20Bill%202020.pdf>, [103]-[107].
[16] Ibid.

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

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

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

Recommendation

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

Analysis

50. The offence provisions are copied here in full, for ease of reference during the discussion.

245AAA Coercing etc. a non-citizen to breach work-related conditions

(1) A person (the ***first person***) contravenes this subsection if:

(a) the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work; and

(b) that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else; and

(c) as a result of the arrangement:

(i) the non-citizen breaches a work-related condition; or

(ii) there are reasonable grounds to believe that, if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related condition.

245AAB Coercing etc. a non-citizen by using migration rules

(1) A person (the ***first person***) contravenes this subsection if:

(a) the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work; and

(b) that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else; and

(c) the non-citizen believes that, or there are reasonable grounds to believe that, the non-citizen must accept or agree to the arrangement:

(i) to satisfy a work-related visa requirement; or

(ii) to avoid an adverse effect on the non-citizen's immigration status under Division 1.

‘Undue’ pressure or influence

51. The first limb of all three coercion and undue influence prohibitions is that a person (intentionally) coerces or exerts undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work.

52. The Law Council queries whether the term ‘undue’ is needed for all of the coercion and undue influence offences. If the qualifier 'undue' is not strictly necessary to give effect to the intended policy outcome, then its inclusion could create a risk of unnecessarily complicating prosecutions and allowing culpable conduct to go unpunished.

53. The Macquarie Dictionary defines ‘undue’ in the context of exerting undue influence as ‘not proper, fitting, or right; unjustified’.[17]

54. There may be a question about the necessity of including the term ‘undue’ in relation to proposed section 245AAA, which relates to work arrangements which would breach a work-related condition.

55. That is, if an employer knows that, or is reckless to the risk that, the proposed work arrangement will cause the visa holder to breach a work-related condition (eg, by working more hours than permitted), then arguably 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.

56. If not, there would be no discernible benefit from separately and additionally requiring the prosecution to establish, to the criminal standard of proof, that the particular degree of 'influence' or 'pressure' exerted on the employee was 'undue' for the purpose of ss 245AAA(1)(a).

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

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

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

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

[17] *Concise Macquarie Dictionary*, (8th ed) ‘undue’.

58. Under the current drafting, the term 'undue' arguably has more work to do in relation to the prohibitions effected by proposed section 245AAB.

59. In section 245AAB, the work arrangement need not *itself* give rise to a breach of a visa condition. What matters for the offence is that the visa holder feels pressure to accept or agreement to the arrangement in order to *avoid* some other detriment – an adverse effect on their visa status or the non-satisfaction of a work requirement. In this way the *intention* to apply pressure on the visa holder and the *extent* of the pressure – factors which go to whether the pressure or influence is 'undue' – are arguably necessary aspects of the offence.

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

61. The Law Council notes that this issue may have arisen because ss 245AAA(1) and 245AAB(1) are dual civil and criminal penalty provisions by reason of subsections (2) and (4) of each section. However, as noted, only the criminal offence provisions apply fault elements (see s 486ZF). Hence, in the case of the civil penalty provisions there may be some basis for retaining the qualifier 'undue' in relation to the degree of influence or pressure.

Recommendation

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

Scope of the offences

62. The new provisions, particularly as they operate as civil penalty provisions, could apply to non-employers.

63. This results primarily from (b) of both offences which provides that the work need not be carried out 'for' the person who exerted the coercion or pressure – it could be carried out for that person *or* someone else.

64. The Taskforce Report recommended that the offences apply to employers.[18] The Law Council understands these provisions may be designed to capture persons who recruit a person to work for other persons. However, they could technically apply to a family member, friend or acquaintance.

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

[18] Ibid, 123.

66. However, when imposed as civil penalty provisions that fault element does not apply.

67. The Law Council suggests that the objective of these provisions should be clarified. If the intention is that the offences should only capture employers or their agents, then the provisions will need to amended. One suggestion is possibly amending (a) of each provision to draw some nexus between the worker and the person applying the coercion or pressure – perhaps some reference to the second person 'offering' the work or in some way being responsible for the offering or arranging the work. Proposed paragraph 245AA(1)(aa) will add to an existing 'overview' section, by describing offences and civil penalties to be inserted into Subdivision C of Part 12 of the Migration Act.

Recommendation

- **The Law Council recommends that consideration be given to whether amendments are required to ensure the new offences and penalties only apply to employers.**

Inconsistency in language

68. It is clear that subparagraph 245AA(1)(aa)(ii) is intended to describe the prohibition in subparagraph 245AAB(1)(c)(i). However, there appears to be an inconsistency between the two.

69. Subparagraph 245AAB(1)(c)(i) provides that the prohibited conduct will occur when the visa holder believes, or there are reasonable grounds to believe, they must accept or agree to the work arrangement *to satisfy* a work-related requirement.

70. However, subparagraph 245AA(1)(aa)(ii) describes the prohibited conduct as occurring when a work arrangement would result in the person *not being able to satisfy* a work-related requirement.

71. That is:

- the prohibited conduct as described in subparagraph 245AAB(1)(c)(i) is in effect coercion/pressure to accept a work arrangement *to avoid* the person not being able to satisfy a work-related requirement;

- whereas the description in subparagraph 245AA(1)(aa)(ii) suggests the prohibited conduct is coercion/pressure to accept a work arrangement that *would result in* the person not being able to satisfy a work-related requirement

72. This inconsistency is material – an 'overview' provision like section 245AA is used to inform an interpretation of the content of the prohibitions themselves. This inconsistency could result in ambiguity as to the content of the prohibitions and complicate prosecutions.

Recommendation

- **The Law Council recommends that consideration be given to redrafting subparagraph 245AA(1)(aa)(ii) so that it is consistent with the provision it is describing: subparagraph 245AAB(1)(c)(i).**

Construction of subparagraph 245AAA(1)(c)(ii)

73. From a drafting perspective, the Law Council queries whether it may be preferable to separate subparagraph 245AAA(1)(c)(ii) into a new stand-alone paragraph which does not turn on the factual condition 'as a result of the arrangement'.

74. At present, combined with the chapeau, subparagraph 245AAA(1)(c)(ii) reads 'as a result of the arrangement … there are reasonable grounds to believe that, if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related condition'.

75. Firstly, there is a tension in the language here – the phrase 'as a result of the arrangement' may suggest the arrangement has been agreed and enacted, whereas the phrase 'if the non-citizen were to accept or agree to the arrangement' suggests it is anticipated that subparagraph 245AAA(1)(c)(ii) will apply in circumstances where the offered arrangement is not accepted and is instead reported before it is accepted or enacted.

76. Secondly, even if the phrase 'as a result of the arrangement' can be read to be 'as a result of the arrangement [offered by the employer]', there may be circumstances where a visa holder's reasonable belief derives from other factors aside from the terms of the arrangement itself.

77. The Law Council considers that there is a risk that that applying the chapeau in (c) to the element in subparagraph (ii) could unnecessarily complicate this aspect of the offence provision, which in the worse-case scenario may risk culpable conduct going unpunished because of a technicality. Namely, on the present drafting of proposed subparagraph 245AA(1)(c)(ii), the prosecution would have to prove, beyond reasonable doubt, that the defendant employer either knew or was reckless in relation to both of the following (the first matter alone would not be enough):

    - there are reasonable grounds to believe that the person's acceptance/agreement to the arrangement would breach a work-related visa condition; and
    - there was a causal linkage between:
        - the arrangement: per the chapeau to paragraph (c), and
        - acceptance or agreement to the arrangement and breach of the visa condition: per subparagraph (ii).

78. It's not clear what, if anything, requiring proof of this causal link in the second dot point above is intended to achieve, as distinct to simply requiring proof of the employer's recklessness as to the likely result of the employee's acceptance of the proposed work arrangement.

Recommendation

- **The Law Council recommends that:**
    - **consideration be given to whether there is any policy reason for requiring there to be a causal link between an arrangement and the belief that acceptance or agreement to the arrangement would result in the breach of visa condition;**

- **if not, consideration be given to separating subparagraph 245AAA(1)(c)(ii) into a new stand-alone paragraph which does not turn on the factual condition 'as a result of the arrangement'.**

Retrospective operation

79. Item 40 of Schedule 1 provides that the compliance notice scheme introduced by Part 6 will apply in relation to conduct (including an omission) occurring before, on or after 27 of the commencement of this Schedule.

80. The Context Paper provides no reason for this position. Laws imposing additional obligations and consequences should be prospective unless appropriately justified. The Law Council expects that these provisions may be made retrospective as they are less onerous that other compliance management tools but suggests this be clarified.

Recommendation

- **The Law Council recommends that a justification making Part 6 retrospective be given in the explanatory material. If the approach is not expected to operate beneficially, the Part should not operate retrospectively**.

Prohibited employer declaration scheme

Content

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

82. A person who is a prohibited employer:

- who starts to employ, or has a material role in a decision of a body corporate to employ, a non-citizen who does not hold a visa or holds a visa other than a permanent visa, is liable to a civil penalty;[19]

- is required to give the Department certain information about persons they employ within the period of 12 months from when they stopped being a prohibited employer.[20]

83. The Minister's power to declare a person to be a prohibited employer is only available if person is:

- an approved sponsor who is subject to a bar for a specified period under paragraphs 140M(1)(d) or (d) of the Migration Act;

- convicted of a work-related offence under the Migration Act;

- subject to a civil penalty order for a work-related provision in the Migration Act; or

[19] Proposed 245AYE of the Migration Act, to be inserted by item 9 of Schedule 1 to the Bill.
[20] Proposed 245AYG of the Migration Act, to be inserted by item 9 of Schedule 1 to the Bill.

- subject to an order made under the Fair Work Act for contravention of certain listed civil penalty provisions under that Act, where the contravention is in relation to a non-citizen.

84. The Minister must publish information (including personal information) about prohibited employers on the Department's website and is not required to remove the information when the person stops being a prohibited employer.[21]

85. The proposed amendments would provide for an exhaustive statement of the natural justice hearing rule in relation to a decision to declare a person a prohibited employer[22] and provide for applications to be made to the Administrative Appeals Tribunal for review of such a decision.[23]

Context

86. According to the Context Paper published by the Department, the new prohibited employer declaration power was introduced to address Recommendation 20 of the Taskforce Report.[24]

87. Recommendation 20 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.*

88. This recommendation was drawn from New Zealand law. The Taskforce Report describes this New Zealand scheme as follows:[25]

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

89. Later in the Taskforce Report, it is stated that:[26]

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

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

[21] Proposed 245AYF of the Migration Act, to be inserted by item 9 of Schedule 1 to the Bill.
[22] Proposed 245AYH of the Migration Act, to be inserted by item 9 of Schedule 1 to the Bill.
[23] Proposed 245AYD of the Migration Act, to be inserted by item 9 of Schedule 1 to the Bill.
[24] Department of Home Affairs, n 8, 4.
[25] Professor Allan Fels AO and Professor David Cousins AM, n 9, 121
[26] Ibid, 124

91. Specifically, under the NZ immigration instructions, an employer who supports a visa application or provides an offer of employment in support of an application must have a history of compliance with employment law.[27]

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

93. Appendix 10 provides that an employer is non-compliant when they have been subject to a particular enforcement action and prescribes the period of time they are stood-down for each kind of action, with the lengthiest stand-down period 24 months.

Headline comments

Prohibited employer declaration scheme is welcome

94. The Law Council generally welcomes the introduction of this scheme and the inclusion of a natural justice scheme and merits review for declarations.

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

Analysis

The scope of the Ministerial discretion

96. The Law Council supports the inclusion of a discretionary power to declare a person to be a prohibited employer to enable the circumstances surrounding the contravention to be considered.

97. However, under the proposed amendments, the Minister's discretion to declare a person to be a prohibited employer would not be expressly confined. The Migration Act would not set out criteria which applies to a decision to make such a declaration and would instead empower the Governor-General to make regulations prescribing such criteria.

98. There are no express criteria or limits as to the regulations which may be prescribed for the purposes of this provision – the power to prescribe such criteria is confined only by the general principle that the regulations be consistent with the Act.[28]

99. In addition, there is no statutory limit or even guidance on the length of period that a Minister could declare a person to be a prohibited employer. Further, the length of that period does not appear to be a matter capable of being constrained by any criteria prescribed in the regulations.

[27] R5.110 of the Immigration New Zealand (INZ) Operational Manual, < https://www.immigration.govt.nz/opsmanual/#64549.htm>.
[28] Subsection 504(1) of the Minister Act.

100. It is a principle of the rule of law that 'executive powers should be carefully defined by law' and that, consistent with this, 'the scope of that delegated authority should be carefully confined'.[29]

101. The open discretion available to the Minister to determine whether a person is a prohibited employer and the period they have that status, and the open discretion provided to the Governor-General (on the recommendation of the Executive Council) to determine any criteria applying to that power, are not consistent with this principle.

102. By way of suggestion, relevant considerations bearing on the making of a declaration and the length of the declaration may include:

- the extent and history of non-compliance;
- the availability and previous use of other compliance tools; and
- the impact to the employer's business and its workers.

Recommendation

- **The Law Council recommends that the Bill be amended to provide detail around the criteria applying to the Minister's discretionary power and to provide guidance or statutory limits around the length of time an employer may be subject to such a declaration.**

Timeframes

103. The Law Council suggests that consideration be given to whether the minimum period of 28 days to respond to a natural justice letter is too long given the possibility of prohibited conduct being ongoing. The Law Council suggests consideration be given to allowing the Minister to set a shorter time if considered appropriate in the circumstances.

104. Conversely, the default position is that a declaration will commence the day after it is made unless that Minister states a different time. Noting the issues raised above, the Law Council suggests that thought be given when setting this period to enabling the employer sufficient time to abide by the direction and make any necessary arrangements for employed migrant workers. This might be a matter which could be directly expressed in the legislation as a consideration relevant to the setting of that period.

Recommendation

- **The Law Council recommends that consideration be given to altering the provisions which provide minimum timeframes for a response to a natural justice letter and for a declaration to take effect.**

[29] 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>.

Publication of information

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

106. The Law Council suggests that this should be subject to the requirement that the information published be true and accurate so far as reasonably practicable, and a person having capacity to ask for incorrect or outdated information to be removed.

Recommendation

- **The Law Council recommends that consideration be given whether amendments to the Bill are required requiring the Minister take reasonable steps to ensure the information published online is true and accurate, and enabling a person to be able to ask for incorrect or outdated information to be removed.**

The identity of the decision-maker

107. Further, given the scope and nature of the Minister's role at the Department, the Law Council queries whether the Minister is most suited to the task of making this declaration, particularly when the person is only covered by the section because they are subject of an order made under the Fair Work Act for contravention of a civil remedy provision.

108. In such circumstances, the FWO, whose primary concern is the enforcement of labour standards under the Fair Work Act, may be a more appropriate authority to exercise this function. Alternatively, it may be appropriate to require the Minister to consider whether they need to obtain advice from the FWO when a person is only covered by the section because they are subject of an order made under the Fair Work Act. These are matters to raise with the FWO.

109. The Law Council further suggests that the relevant court determining the penalty proceedings could be an additional, or an alternative, authority to make prohibition declarations. It notes that this is the approach taken in New Zealand, where the Employment Court of New Zealand is responsible for making declarations of breach and banning orders, and prohibiting recruitment of migrant workers for 12 months, in cases where an employer has breached minimum employment standards. The breach and banning orders then trigger a stand-down the NZ immigration instructions.

Recommendation

- **The Law Council recommends that consideration be given as to whether the FWO should be given a role in the protected employer prohibition declaration decision when the only relevant contravention is an order made under the Fair Work Act – either as the decision-maker or as an entity from which the Minister may wish to seek advice.**

Migrant workers in a 'domestic context'

110. The Bill prohibits a prohibited worker from *employing* a non-citizen, with 'employs' defined for the purpose of Subdivision E of Division 12 of Part 2 to include a person

who 'employs a non-citizen under a contract of service' or 'engages a non-citizen, other than in a domestic context, under a contract for services'.

111. The proposed definition of 'employs' is identical to paragraphs 245AG(2)(a) and (b) of the Migration Act, which defines the circumstances in which someone may 'allow' a non-citizen to work.

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

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

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

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

115. Proposed paragraph 245AYB(b) of the proposed Bill is directed at different conduct. It does not capture households across Australia – it is directed only at persons already declared to be prohibited employer. The Law Council notes the identified prevalence of forced labour in domestic work settings in Australia.[30] Earlier this year, the Federal Court of Australia presided over a matter where it was accepted that the *Miscellaneous Award 2010* (Cth) governed the domestic employment of a nanny and ordered a penalty payment for a breach of the terms of that Award.[31]

Recommendation

- **The Law Council recommends that consideration be given as to whether a prohibited employer's engagement of a non-citizen in a domestic context be permitted for the period of the declaration.**

[30] Global Slavery Index, *Country Studies – Australia*, https://www.globalslaveryindex.org/2018/findings/country-studies/australia/.
[31] *Fair Work Ombudsman v Lam* [2021] FCA 205.

Consideration should be given to the impact on workers

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

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

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

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

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

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

122. That person:

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

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

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

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

123. This issue is not addressed in the Context Paper nor in the Taskforce Report. Unless proper consideration is given to how to overcome the reticence of that person to come forward to cooperate with the authorities, through considered changes to the

Migration Regulations 1994 (Cth) (**Migration Regulations**), the above detriments may result in the person not reporting that misconduct.

Recommendation

- **The Law Council recommends consideration be given to any necessary amendments to the Migration Regulations and under policy to mitigate any detrimental effects of a prohibited employer declaration on migrant workers.**

VEVO provisions

Content

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

125. Specifically, the current prohibitions on a person allowing or referring an unlawful non-citizen do not apply if the person:

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

126. For paragraph (a), the 'computer system operated by the Department, and known as "Visa Entitlement Verification Online", or 'VEVO"' is prescribed.[32]

127. For paragraph (b), both 'entry into a contract under which a party to the contract … [verifies] that a person has the required permission to work in Australia' or inspection of certain documents are prescribed.[33]

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

> *is, and continues to be, reasonably satisfied that the worker is [not an unlawful non-citizen/ not in breach of the work-related condition solely because of doing the work] on the basis of information obtained:*
>
> *(a) by logging into and using the prescribed computer system to source the information; or*
>
> *(b) unless the first person is a required system user—under an arrangement by which another person logs into and uses the prescribed computer system to source the information*

129. That is, now VEVO will be the only authorised source of truth[34] – inspection of identification documents or contractual arrangements will not meet the requirements.

[32] Regs 5.19G(1), 5.19H(1), 5.19J(1), 5.19K(1) of the Regulations.
[33] Ibid, Regs 5.19G(2), 5.19H(2), 5.19J(2), 5.19K(2) of the Regulations.
[34] The Context Paper suggests that the computer system will continue to be VEVO.

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

Headline comments

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

132. However, the Law Council makes the following comments about the proposed amendment to the defences to the existing offences, to require that only VEVO may be used to check whether a person is an unlawful non-citizen or is in breach of a work-related condition, and no longer permit contractual arrangements or sighting of documents to be used.

133. Firstly, the Law Council suggests that flexibility should be retained within paragraphs 245AB(2)(b) and 245AE(2)(b) to allow a person to rely on appropriate evidence of Australian citizenship to verify that the prospective worker is not an unlawful non-citizen. Currently, the VEVO system cannot return a record if the individual is an Australian citizen – an error message is returned. As a result, it is necessary for an employer to sight the passport or citizenship certificate or birth certificate for those born before 20 August 1986 along with a photo ID to confirm that the person is Australian and not a visa holder or unlawful non-citizen. Similarly, this applies to New Zealand Citizens. The current flexibility in reg 5.19G of the Migration Regulations should be able to be relied on.

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

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

136. Fourthly, currently (and appropriately) a person is unable to use VEVO to make an inquiry about a person without that person's permission.[35] The Law Council suggests the Department consider to the possibility that it may not be possible to obtain that permission in each case – either for practical reasons of because permission is refused.

[35] See cl 2c of 'User Access', Terms and Conditions of VEVO Use By Organisations - Inquiry Stage, < https://immi.homeaffairs.gov.au/help-text/migration/Pages/terms-conditions/vevo-3rd-party-logon-tc.aspx, accessed 19 August 2021.

137. Fifthly, the Department provide further clarity as to how this will be enforced and in particular, whether any updates to information about the use of site visit data need be made. Currently, the Terms and Conditions of VEVO Use By Organisations - Inquiry Stage states, under the heading 'Site visa data', that:

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

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

139. Finally, the Department should take steps to ensure that VEVO can adequately be used to ascertain whether a person is an unlawful non-citizen or in breach of work-related condition and whether their visa status permits them to work on all occasions. The Law Council has received feedback from constituent bodies that this may not always be the case.

140. An employee has a right to work in Australia if they are an Australian citizen, a permanent resident of Australia or they are a non-citizen that has a current visa with work entitlements.

141. However, it is not always possible to verify that an employee has a right to work in Australia using VEVO. For example:

    (a) the VEVO system is only used for the purpose of verifying the right to work status of visa holders and cannot be used to verify that an individual is an Australian citizen or permanent resident;

    (b) in order to undertake a VEVO search a person needs to input relevant data (such as a passport number or an IMMI card number and date of birth) and without the relevant information, cannot conduct a VEVO search;

    (c) a VEVO search is unlikely to obtain any results for non-citizens who entered Australia prior to the establishment of VEVO; and

    (d) a non-citizen may have been granted a visa with work entitlements, however, when inputting their current passport number into VEVO. VEVO does not produce any result if the visa was recorded against a passport which has subsequently been replaced and the visa holder has not informed the Department of their new passport (so their visa details are not attached to their new passport). Unless the visa holder is able to provide an employer with their old passport number, VEVO cannot be used to verify that they are not an unlawful non-citizen.

142. The Law Council notes that this issue may be addressed in some way by proposed section 245APA, which provides that if the information cannot be sourced from the system 'due to circumstances beyond the reasonable control of the person seeking to log into and use the system', in which case the information may be obtained by 'doing one or more things prescribed by regulations made for the purposes of this subsection'.

143. The Law Council recommends that these regulations be in the same form as the current regulations, but consideration be given to explicitly including some flexibility to obtain the information from other sources. There are many people in the community who do not have a birth certificate or an Australian Passport and who will therefore be unable to produce the documents listed.

Recommendation

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

Analysis

144. The heading of the new civil penalty provisions sections 245AEC and 245AED suggests that they are intended to apply to non-citizens, but the drafting does not confine them to non-citizens.

145. Specifically:

- proposed section 245AEC provides that a 'person (the ***first person***) must not start to allow another person (the ***worker***) to work …'; and
- proposed subsection 245AED(2) provides that the 'first person must not refer another person (the ***prospective worker***) for work'.

146. This drafting captures a wider class of people than non-citizens and would, for example, include Australian citizens. If the sections are intended to relate to non-citizens, the sections should be expressly confined using this term.

Recommendation

- **The Law Council suggests consideration be given to amending proposed sections 245AEC and 245AED to make explicit reference to 'non-citizens'.**

Summary of the offence		First limb		Second limb		Third limb	
		Physical element	Fault element	Physical element	Fault element	Physical element	Fault element
Employer intentionally coerces or unduly pressures a migrant to accept a work arrangement in Australia and the employer knows that or is reckless to risk that …	the work arrangement would result in the breach of a prohibition/restriction on work applying to the migrant	the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work (proposed s 245AAA(1)(a))	intention (s 5.6(1) of the Criminal Code)	that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else (proposed s 245AAA(1)(b))	knowledge or recklessness (proposed s 245AAA(3))	as a result of the arrangement: (i) the non-citizen breaches a **work-related condition**; or (ii) there are reasonable grounds to believe that, if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a **work-related condition** (proposed s 245AAA(1)(c))	knowledge or recklessness (proposed s 245AAA(3))
	the migrant will believe they must accept the arrangement to be able to provide evidence of work performed to Department	the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work (proposed s 245AAB(1)(a))	intention (s 5.6(1) of the Criminal Code)	that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else (proposed s 245AAA(1)(b))	knowledge or recklessness (proposed s 245AAB(3))	the non-citizen believes that, or there are reasonable grounds to believe that, the non-citizen must accept or agree to the arrangement to satisfy a **work-related visa requirement** (proposed s 245AAB(1)(c)(i))	knowledge or recklessness (proposed s 245AAB(3))
	the migrant will believe they must accept the arrangement to avoid losing their visa/being refused a visa	the first person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to an arrangement in relation to work (proposed s 245AAB(1)(a))	intention (s 5.6(1) of the Criminal Code)	that work is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or someone else (proposed s 245AAA(1)(b))	knowledge or recklessness (proposed s 245AAB(3))	the non-citizen believes that, or there are reasonable grounds to believe that, the non-citizen must accept or agree to the arrangement to avoid an adverse effect on the **non-citizen's immigration status under Division 1** (proposed s 245AAB(1)(c)(ii))	knowledge or recklessness (proposed s 245AAB(3))

work-related condition: a condition prohibiting or restricting work by a visa holder in Australia (subsection 5(1) of the *Migration Act 1958* (Cth) (**Migration Act**))

work-related visa requirement: a requirement under migration law to provide, in connection with a visa or visa application, information or evidence about work the non-citizen has undertaken in Australia (proposed subsection 245AAB(5) of the Migration Act)

non-citizen's immigration status under Division 1: Division 1 of Part 2 of the Migration Act provides that a non-citizen in the migration zone is either a lawful non-citizen (because they hold a visa which is in effect) or is an unlawful non-citizen (because they do not hold a visa which is in effect) (sections 13 and 14 of the Migration Act). An officer who knows or reasonably suspects that a person is an unlawful non-citizen must detain the person (s 189).