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Migration Amendment (Protecting Migrant Workers) Bill 2021

Exposure Draft

ACCI Submission

16 August 2021

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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Australian Chamber of Commerce and Industry

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Sufficient time be allowed for the practical ramifications of the proposed amendments to be considered as widely as possible before parliamentary debate to ensure effective implementation and avoid unintended consequences.

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The fault elements for offences under Schedule 1, Part 1 of the Bill should be based on knowledge alone, omitting any reference to "or recklessness".

Schedule 1, Part 2

Recommendation 3: 'Excluded Employer' Not 'Prohibited'

Each reference in Part 2 to a 'prohibited employer' should be amended to become references to an 'excluded employer'.

Recommendation 4: Clarity on the Timing of Exclusion or Prohibition

Redraft the various amendments in Part 2 to be clear and consistent on which actions employers can and cannot take when sanctioned, using known concepts in employment law such as offering a job, or allowing someone to commence work.

Recommendation 5: Allow Employers Sufficient Time to Respond

Allow employers that are proposed to be excluded 56 rather than 28 days to make a written submission to the Minister.

If necessary, allow the Minister freeze, restrict or condition access to the employment of non-citizens on an interim basis while an employer is responding to a proposed sanction.

Recommendation 6: Ensure Employers Can Argue Against Adverse Impacts of Exclusion or Prohibition

Ensure the legislation allows the Minister to make a balanced and properly informed assessment about the impact of any proposed exclusion, taking into account not only the conduct which may give rise to exclusion, but also its impacts on the business, jobs, and communities including migrant communities.

Recommendation 7: Ensure there is flexibility / discretion on publication

Ensure s 245AYF provides the Minister or Department with sufficient discretion to not publish, to publish in part or to redact where required.

Recommendation 8: Confine to Underpayment

The Bill should attach prohibitions or exclusions to underpayments / contraventions of remuneration related provisions of the Fair Work Act only, and not to other breaches / matters.

Recommendation 9: Contracts of service / employment only

Section 245AYB and the application of any prohibitions / exclusions in Part 2 should apply to employment (contracts of service) only and not seek to extend to independent contracting (contracts for services). There should be no attempt to mis-define employment or employing to include independent contract relationships.

Recommendation 10: Clarify conduct that can trigger prohibition / exclusion

Amend s 245AYD(4) to clarify that the offences or civil penalties matters that can give rise to an employer's prohibition or exclusion under Part 2 should be restricted to those in the preceding 2 years, or in exceptional circumstances up to 5 years.

Recommendation 11: Confine the triggering civil remedy provisions to those directly relating to remuneration only (s 245AYD(10))

The civil remedy provisions of the Fair Work Act 2009, the contravention of which can give rise to exclusion / prohibition under Part 2 should be restricted to underpayments, and breaches of instruments that set rates of pay in relation to underpayments, and to matters directly associated with remuneration.

Fair Work Act breaches in relation to non-wage conditions of employment or any other matters should not be able to give rise to prohibition or exclusion under Part 2.

Recommendation 12: Amend the table in s 245AYD(d)(10)

Delete Item 1 – NES

Clarify Items 2, 3 and 4 that it is only breaches of the pay and remuneration provisions of modern awards, enterprise agreements, and workplace determinations that should be able to give rise to any exclusion or prohibition provided for in Part 2 of the Bill.

Other breaches / other civil remedies in relation to conditions (rather than pay) or procedural requirements should not be able to trigger the exclusion or prohibition process or sanctions

Schedule 1, Part 3

Recommendation 13: Release VEVO statistics

Release prior to parliamentary debate on the Bill the total number of employers registered for VEVO (and as a percentage of all employers), the total number of non-citizens for whom records exist (as a percentage of all employees hired each year).

Recommendation 14: Allow time for promotion prior to commencement

Divide the commencement table in Item 2 of the Bill to allow separate proclamation for each Part of Schedule 1.

ACCI has not included a separate numbered recommendation for each of the points that we recommend be considered to refine and improve the Bill, or to resolve uncertainty. We urge consideration of the following submission and the matters raised as a whole

Australian Chamber of Commerce and Industry

INTRODUCTION

1. The Australian Chamber of Commerce and industry (ACCI) thanks the Government for the opportunity to comment on the exposure draft of the Migration Amendment (Protecting Migrant Workers) Bill 2021 (the Bill), and the accompanying Context Paper.

2. There is much in the aims of the legislation, and in the execution of many of the amendments which ACCI supports or has to date not identified problems with. This reflects employer acceptance of the need for some level of change in the wake of the high profile matters that gave rise to the Migrant Worker Task Force (MWT) , and also noting the Fair Work system significant changes made in 2017, which for example increased fines tenfold.

3. This submission unavoidably focuses on areas of ambiguity or concern to employers from the Bill in Exposure Draft form.

4. We are concerned about the exceptionally brief period that has been allowed to assess the Bill and provide input to Government. ACCI has not been able to take the level of member input necessary to comprehensively address and provide input on such potentially wide-ranging and widely impacting changes. We can provide you with no more than a desktop analysis given the very short time frame allowed.

5. An example of the limitations created by the short time frame is our inability to appropriately canvas with our members (a) the current level of usage of the VEVO system, (b) whether VEVO is currently triggered in relation to every new job or only where the employer understands they are employing a non-citizen, and (c) how an employer could reach that understanding without breaching anti-discrimination law. We were not able to properly test such questions against current practice, because there was not sufficient time.

6. We acknowledge that the MWT report and recommendations have been available since early 2019, however:

    a. The recommendations were very brief, and the detail of their implementation (which goes beyond the specific recommendations) is only now available.

    b. There has not been a sufficiently clear proposal for their implementation prior to August 2021 to allow more considered analysis.

    c. ACCI has been focused to date on the preceding, separate proposals to implement those recommendations which sought to amend the Fair Work Act 2009 in relation to underpayment (Schedule 5 of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021).

7. Proposals of this magnitude, and with such pervasive affect not just on users of the migration system but potentially for each and every employer and employee in Australia need more time and wider consultation than a single week.

Recommendation 1: Timing

Sufficient time be allowed for the practical ramifications of the proposed amendments to be considered as widely as possible before debate to ensure effective implementation and avoid unintended consequences.

This Should Go to COIL Before Introduction

8. ACCI also notes the proposed nexus to the penalty provisions of the Fair Work Act 2009. Whilst we do not understand the Bill to directly seek to amend the Fair Work Act 2009, there is an established mechanism based on Australia's treaty obligations and convention for taking employer and trade union input on proposed workplace relations legislation, through the National Workplace Relations Consultative Council (NWRCC) and its Committee on Industrial Legislation (COIL).

    a. The COIL mechanism was set up in furtherance of Australia's treaty obligations under ILO Convention 144.

    b. Australia's constitutional obligations as a member of the International Labour Organisation more generally appear to compel a necessary level of consultation with employers and trade unions prior to the introduction of legislation which has an effect on employment and employment obligations and liabilities to the extent proposed in this Bill.

    c. This bill should have been subject to the COIL process. This should still be undertaken, even if it is COIL online.

    d. We note that Schedule 5 of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, which sought to implement the other half of the MWT recommendations was subject to COIL discussion and tripartite engagement in the months preceding the consolidated draft coming together.

9. ACCI was reinforced in this view, and in the necessity of applying the COIL process, as we worked through the detail of the Bill. Proper consideration of the amendments requires significant engagement with the terms of the Fair Work Act.

    a. A particular and worrying concern for employers is the proposal to redefine the fundamental concept of employment to include both contracts of service and contracts for services (s 245AYB). There are few issues in workplace relations that raise greater risks and concerns for the business community. We describe this in the submission as opening Pandora's box, and greet such a proposition with the highest possible degree of concern and scepticism.

10. We also note the dedicated section of this submission on which parts of the Table in s 245AYD(10) of the Bill are and are not properly considered underpayment provisions. this is again fundamentally a workplace relations concern that members of the NWRCC should have the opportunity to have regard to through COIL.

11. Such considerations underscore the importance of applying the proper consultation processes through COIL, and not assuming Government can gain proper and sufficient input on such wide ranging propositions in less than five working days.

We Don't Have the Explanatory Memorandum

12. There are limitations in responding to any draft Bill where one lacks access to the supporting materials which could provide clarification on particular issues, principally the Explanatory Memorandum.

13. Perhaps the most positive way to view this is that we hope in addition to making the changes we seek to the Bill prior to introduction, the Minister will also consider clarification of matters we have raised through the Explanatory Memorandum in due course.

Regulatory Impact Statement

14. These changes seem set to have a significant regulatory impact and may impose a massive additional red tape impost on business, including businesses that to their knowledge have never employed a migrant or visa holder, or considered the Migration Act 1958.

15. Has this been / will this be subject to a Regulatory Impact Statement (RIS). Will this be available to the Parliament prior to passage? Will this be made available to interested parties prior to consideration by Parliament?

16. Has advice or assistance been sought from the OBPR in relation to the Bill and the proposed changes? Has there been any engagement with the Australian Small Business and Family Enterprise Ombudsman on the impact on small businesses?

Timing

17. It is clear that migrant work in Australia reduced significantly during the pandemic.

18. It will be very important as part of reopening to resecure the diversity of our labour market, and ensure we again benefit from having non-citizens able to work, ranging from students and holiday makers to those with globally unique skills or filling skills gaps in the existing labour force.

19. Is a period of significant recovery in migrant work the right time to impose such new liabilities and requirements? Has consideration been given to the particular impact of:

    a. Employers having to change how they employ / employ migrants at a time when they are trying to recover and navigate ongoing uncertainty?

b. Increasing and extending obligations and risks as Australia embarks on what may be our largest and fastest ever (re)engagement of migrant workers as borders reopen?

c. These changes commencing when rapid rehiring and recovery is critical?

20. We invite consideration of whether there could be staged or phased implementation of the amendments, to smooth their implementation and give users of the system more time to adjust to new obligations.

21. This would mean adjusting the proposed commencement Arrangements to give the Minister more discretion and flexibility.

22. Were the commencement table on page 2 of the Bill to split each part of Schedule 1 to commence on a separate (rather than single) day to be set by proclamation, this would. give the Minister more options to stagger its introduction and to work with stakeholders on implementation promotion and information to ensure these changes deliver the outcomes sought.

Labour Hire

23. ACCI has focussed our input directly on employment by an employer, of an employee. However throughout the Bill there are comparable or reciprocal references or amendments seeking to address situations where a person 'refers' a non-citizen for work.

24. ACCI has drawn the attention of this review to the recruitment and on hiring sector and various industry bodies may directly seek to you provide you with their concerns and input. The input of this sector seems particularly critical before proceeding.

Other Matters

25. The following submission focuses on Parts 1 to 3 of Schedule 1 of the Bill. ACCI does not wish to address at this stage the matters in the remaining schedules.

26. However:

a. Options for undertakings and compliance notices to constructively educate employers and change practices without damaging additional or ongoing sanctions where appropriate appear broadly positive. ACCI will examine the detail further in due course.

b. There is already a comprehensive regime under the Fair Work Act 2009 for the FWO to enter into Enforceable Undertakings, and for the issuing of Compliance Notices.

c. We recommend a clarifying provision or a statutory note in both parts 5 and 6 to the effect that nothing in those parts confers any additional powers upon any minister in relation to the Fair Work Act 2009, or in relation to compliance with that Act or any instrument made under that Act.

SCH.1, PART 1 – NEW SANCTIONS

Recklessness v Knowledge

27. The primary concern raised by the new measures in Schedule 1, Part 1 are raised by the fault elements for new criminal offences set out in Item 4 (proposed s 245AAA(3) and s 245AAB(3)), specifically:

> (3) For the purposes of subsection (2), the fault element for paragraphs (1)(b) and (c) is knowledge or recklessness by the first person.

28. ACCI recognises that there are various existing uses of the word 'reckless' in the Migration Act. ACCI does not however support the proposed fault element of 'recklessness' being attached to the various new criminal offences in relation to coercion, undue influence or undue pressure.[1] The test should be one of knowledge alone, without any additional element of recklessness.

This is not what the MWT Recommended

29. **The MWT did not recommend a test based on anything other than direct knowledge.** Recommendation 19 from the MWT was unambiguous (emphasis added):

> **Recommendation 19**
>
> 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.

30. The MWT recommendation is very clear, to create a new offence based on knowledge, not based on or extended to any alternative test of recklessness. This recommendation would have been made in full knowledge that 'reckless' is currently used elsewhere in the Migration Act.

31. Unions have for many years sought to attach the strongest sanctions for underpayment to reckless or inadvertent actions by employers, as well as intentional dishonesty. Given that the MWT addressed underpayment in such detail, it would be impossible for it to have proceeded without canvassing the difference between knowing or intentional actions and reckless ones.

32. With this in mind, the Government should proceed on the basis that the MWT was well aware of the distinction between knowing actions and reckless ones and expressly chose to frame Recommendation 19 solely around the former, rather than the latter.

33. If Government is going to give effect to what the MWT recommended, the new criminal offences in Part 1 need to be framed solely around knowledge as the sole fault element, as follows:

[1] Proposed s 245AAA(3), s 245AAB(3), etc.

(3) For the purposes of subsection (2), the fault element for paragraphs (1)(b) and (c) is knowledge ~~or recklessness~~ by the first person.

34. We also recall MWT Recommendation 6:

> **Recommendation 6**
>
> It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

35. "Clear, deliberate and systematic". Again the MWT heard calls from unions to extend any criminal offence for underpayment to recklessness and refused to make a recommendation to Government in such terms. In its recommendations the MWT refused to divorce criminality from knowledge and intent, and that should flow through into these amendments.

36. When the Government sought to give effect to MWT Recommendation 6 to criminalise some forms of underpayment in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020[2], it framed the proposed offence around dishonesty. In doing so, it clearly created an offence based on knowledge and intent, and equally clearly did not adopt a wider test of recklessness, which would have been at odds with what the MWT recommended.

37. That approach should be maintained in relation to this legislation, which should also not extend beyond MWT Recommendation 19.

<u>The actions targeted must be done with knowledge and intent</u>

38. It seems as a matter of logic that coercion, undue influence or undue pressure all inescapably and as a matter of fundamental definition and well understood meaning rely on knowledge / intent. This seems axiomatic. The ABCC website indicates that:

> *Coercion is the act of organising or taking action, or threatening to organise or take action against someone with the intent to influence that person or another person to do something.*[3]

39. The Fair Work Commission's General Protections Bench Book contains the following:

> ***What is coercion?***
>
> *A person coerces another to act in a particular way if the first person brings about that act by force or compulsion. Coercion will cause a person to act in a way that is non-voluntary.*[4]
>
> *There must be two elements to prove 'intent to coerce':*

[2] Schedule 5, Part 7,
[3] https://www.abcc.gov.au/your-rights-and-responsibilities/coercion
[4] Fair Work Act s.343.

- *it needs to be shown that it was intended that pressure be exerted which, in a practical sense, will negate choice, and*

- *the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable.*[5]

Coercion is distinguished from other concepts including influence, persuasion and inducement. Coercion implies a high degree of compulsion and not some lesser form of pressure where a person is left with a realistic choice as to whether or not to comply.[6]

Coercion may take many forms. Persuasion becomes coercion when a person who influences another does so by threatening to take away something they possess, or by preventing them from obtaining an advantage they would otherwise have obtained.[7]

The prohibition applies irrespective of whether the action taken to coerce the other person is effective.[8] *However, the actual effect of conduct may indicate the intent or purpose of the alleged contravener when the action was taken.*[9]

40. The notion of recklessly but unknowingly coercing, pressuring or influencing someone is unsustainable, if not nonsensical. In each case there has to be a purpose behind the actions or wrongs, without which it is not clear what a person may be seeking to have someone else do or not do. Reckless coercion seems as contradictory and nonsensical as speaking of reckless extortion, or reckless blackmail; coercion is an offence or wrong of knowledge and intent.

41. ACCI does not read the proposed amendments, with 'recklessness' removed as requiring sophisticated understanding of the visa requirements or work-related conditions. Rather the actions should focus on not allowing someone to unfairly threaten someone else into breaching the law which inescapably requires knowledge and intent.

The Fair Work Act 2009

42. The operative notions of 'coercion', 'undue pressure' and 'undue influence' are already addressed under the Fair Work Act 2009.

43. It is quite clear from s 348 that coercion is directly reliant on knowledge/intent:

Section 348 - Coercion

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

[5] Finance Sector Union v Commonwealth Bank of Australia (2000) 106 IR 139 [44]; cited in Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd (2010) 188 FCR 221 [63].
[6] National Tertiary Education Industry Union v Commonwealth of Australia (2002) 117 FCR 114 [103]; cited in Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd (2010) 188 FCR 221 [65].
[7] Ellis v Barker (1871) 40 LJ Ch 603; cited in National Tertiary Education Industry Union v Commonwealth of Australia (2002) 117 FCR 114 [103]; and Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd (2011) 201 IR 441 [49].
[8] Explanatory Memorandum to Fair Work Bill 2008 [1391].
[9] Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd [2013] FCA 446 [228].

44. In relation to undue pressure or influence, this is addressed in s 344 of the Fair Work Act 2009. The FWC provides the following explanation:

> **What is undue influence or pressure?**
>
> These provisions do not require coercion, but there must be some conduct which nevertheless amounts to the exercise of some influence or some pressure in order to make an employee act in a particular way. The provisions set a lower threshold than coercion.[10]
>
> The prohibition applies in circumstances where an employer makes an agreement with an individual employee (not employees acting collectively) and where the employer should be expected to take care not to exert significant and inappropriate pressure on an employee to make the agreement.[11]
>
> 'Undue' conduct is conduct that is 'unwarranted; excessive; too great' or 'not proper, fitting or right; unjustified.'[12]
>
> To 'influence' is 'to move or impel to, or to do, something'.[13]
>
> The word 'pressure' refers to harassment or oppression.

45. Again, each of these concepts appears absolutely indivisible from knowledge and intent, and quite inapplicable to be determined by any notion of recklessness.

Contradiction in the Note?

46. There seems a contradiction in statutory to each of the new offence provisions in Part 1:

> *Offence*
>
> (2) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.
>
> Penalty: Imprisonment for 2 years or 360 penalty units, or both.
>
> (3) For the purposes of subsection (2), the fault element for paragraphs (1)(b) and (c) is knowledge or recklessness by the first person.
>
> *Civil penalty provision*
>
> (4) A person is liable to a civil penalty if the person contravenes subsection (1).
>
> Note: It is not necessary to prove a person's state of mind in proceedings for a civil penalty order (see section 486ZF).
>
> Civil penalty: 240 penalty units.

[10] Explanatory Memorandum to Fair Work Bill 2008 [1396].
[11] Explanatory Memorandum to Fair Work Bill 2008 [1395].
[12] Stuart v Construction, Forestry, Mining and Energy Union (2009) 190 IR 82 [18], cited in Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 2) [2012] FMCA 459 [36].
[13] The Macquarie Dictionary (2nd ed, 1991), 903; cited in Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 2) [2012] FMCA 459 [37].

47. If it is not necessary to prove a person's state of mind in civil proceedings, presumably this is required for the criminal offence. Looking at the proposed fault elements, is it possible to prove recklessness as a state of mind? Proving actual knowledge seems far clearer and more in character with the purpose and framing of the note.

A Clarification

48. We ask for clarification of the following:

> There have been reports that some working holiday makers have accepted unsafe working conditions when undertaking specified periods of work in order for them to qualify for a second or third working holiday visa.

49. There are already significant sanctions in WHS law for allowing or directing people to work unsafely, which would seem to be triggered in the scenario cited.

50. Employers' work health and safety obligations apply equally to all their employees, regardless of their visa status. An employer exercising recklessness in this regard would clearly be picked up as not meeting their WHS duties under WHS law. Reckless disregard for employee safety can lead to manslaughter charges.

51. This is not however coercion, influence or pressure in the context of Part 1 unless the unsafe work is part of a specific threat, or somehow framed as a sanction or punishment against migrant workers. Such a course of action, threatening someone with unsafe work, would however be, frankly as stupid as it would be unfair.

52. Looking at the example this seems less a threat of 'you do / don't do A or I will do B' as potentially someone who is not observing a range of their employment obligations, including on safety.

53. One significant concern is perceptions by non-citizens that they cannot raise concerns about their safety (or their pay) without having their job or visa threatened / being asked to leave the country. No one should work unsafely or be in fear of raising safety concerns.

54. In parallel with the Bill the Ministers for Immigration and Industrial Relations might usefully ask for an update on the ongoing cooperative work of agencies such as the FWO to overcome such misperceptions.

55. This does not however provide any basis upon which to wrongly frame an offence which should inescapably, and solely be framed around an employer's knowledge.

This Needs to Be Right

56. The creation of offences carrying a potential two-year gaol sentence cannot be rushed.

57. If this legislation requires additional consultation and more consideration, due time should be allowed for that to occur.

Recommendation 2: Delete 'or recklessness

The fault elements for offences under Schedule 1, Part 1 of the Bill should be based on knowledge alone, omitting any reference to "or recklessness".

SCH.1, PART 2 – PROHIBITIONS ON EMPLOYERS

58. ACCI supports the broad policy intent behind Part 2 and notes:

    a. Existing capacities under the Migration Act 1958 to bar employers misusing the system in particular circumstances.

    b. MWT Recommendation 20.

59. ACCI supports the principle that those who do the wrong thing in relation to the employment of non-citizens should as a general principle be barred, excluded or restricted from further such employment for a set period.

60. We do have input however on the proposed implementation, and areas in which Part 2 of the Bill can and should be improved, and how this can best be executed.

61. We also want to call out the risk of harms that any exclusion, bar or restriction may create and to urge Government to consider how in advance how such situation should be addressed.

62. We have separated this input into three sections:

    a. This section addresses the process, mechanical, and general issues raised by Part 2.

    b. The next section focuses on the interaction of Part 2 with the Fair Work Act, and which sections and process under that Act may give rise to prohibitions, however termed.

    c. The third section on Part 2 of Schedule 1 of the Bill focuses on the Table which appears at s 245AYD(10) and addresses specific civil remedy provisions of the Fair Work Act 2009 breaches of which should or should not give rise to prohibition or exclusion.

Terminology: 'Excluded' Not "Prohibited' Employer

63. Prior to addressing the substance of Part 2, ACCI urges that the terminology be recalibrated.

64. Firstly on the grounds of ambiguity. An employer would not be prohibited from employment, or banned from employing. Rather someone clearly remains an employer, but becomes an employer who is excluded from using certain capacities and avenues under our law to employ migrant workers. The term 'prohibited employer' is inaccurate, misleading and unduly pejorative.

65. Australia has treaty obligations through our membership of the International Labour Organisation (ILO), which in turn stands at its core for the fundamental rights to exist of trade unions and employers. At the core of our very existence it is the right of employers to employ, and citizens to be employed – and any nation that purports or nominally presents as to outright prohibit such rights risks sending poor and contradictory signals on human rights.

66. The notion of a 'prohibited employers' sets a very poor tone and perhaps substance in ILO terms; and it sends a signal inconsistent with our international treaty obligations to respect the fundamental existence of employers and workers (to use the ILO term).

67. We do not have prohibited trade unions, even where there is persistent and calculated lawbreaking, corruption and fraud. The sanction or sanctioned status of a trade union is to become 'deregistered', and is not prohibited. In fact any Australian legislation which sought to create such a beast as a 'prohibited trade union' would give rise to a treaty complaint from the ACTU the moment it was proposed. ACCI is making the same point, to speak of a prohibited employer risks either the perception or the reality of overstepping some fairly fundamental rights.

68. Prohibited is also not the best word to capture what Part 2 is doing, it provides for temporary exclusions, not outright prohibitions.

Recommendation 3: 'Excluded Employer' Not 'Prohibited'

Each reference in Part 2 to a 'prohibited employer' should be amended to become references to an 'excluded employer'.

Terminology: Employing or starting to employ? It's Just Confusing.

69. There is some confusing wording in elements of the drafting which seem inconsistent with both employment law and the practical realities of employment.

70. Proposed s 245AYA(4) would prohibit employer having done certain wrongs from starting to employ additional noncitizens.

71. We are not clear what starting to employ someone means. Is it allowing someone to commence their first shift, is it advertising a job, or is it making an offer of employment?

72. There are various legal events in the course of employment to which obligations could be attached, or in this case in which exclusions could be attached, and it would be clearer and cleaner to trigger the prohibition or exclusion based on a clear event during the course of employment.

73. Consider the following superior and clearer alternative formulations of the apparent intent of s 245AYA(4):

> (4) an excluded employer must not make an offer of employment to an additional non-citizen after the day the declaration comes into effect.
>
> (4) an excluded employer must not make an offer of employment to an additional non-citizen, or allow an additional non-citizen to commence work after the day the declaration comes into effect.

(4) an excluded employer must not make an offer of employment to an additional non-citizen, or allow an additional non-citizen to commence work after the day the declaration comes into effect, other than in circumstances in which the employer can prove / declares / provides evidence that that an offer of employment was made and accepted prior to the date upon which the prohibition commenced.

We raise this final consideration as it appears unfair to the non-citizen to have them accept an offer of employment only to have the employer revoke it as a consequence of becoming a prohibited employer.

74. We urge that there be consideration of a superior and clearer formulation of s 245AYA(4) that will be more effective in the regulatory purpose, and less inviting of litigation and ambiguity.

75. We also raise the issue of casual versus ongoing employment, merely to point out that a casual engagement is by the day or shift, and raises very different considerations and lesser harms and risks than circumstances in which an ongoing employee is unable to continue their employment. ACCI wishes to further consider the implications for casual work.

76. We repeat this point in relation to proposed section 245AYE. The notion of 'starting to employ' a non-citizen is ambiguous, and at very least requires a definition or clarity on what that action constitutes. We note in making this point that this section can trigger fines of up to $10,000.

77. This is further confused by the reference in Item 11(e) at the end of Part 2 to "an arrangement to employ a non-citizen which is made on or after the commencement of this schedule".

78. What is such an arrangement? This is again not a clear trigger, event or concept that seems known to employment law. This is far better couched in terms of an employer not making an offer of employment, or not allowing an employee to commence work both of which have a clear and established legal meaning. The notion of an arrangement to employ someone seems unacceptably vague and imprecise, and is almost certain to give rise to ambiguity and litigation.

Recommendation 4: Clarity on the Timing of Exclusion or Prohibition

Redraft the various amendments in Part 2 to be clear and consistent on which actions employers can and cannot take when sanctioned, using known concepts in employment law such as offering a job, or allowing someone to commence work.

Avoid Double Penalties

79. We note the proposed inclusion amongst those who may be declared to be prohibited (ACCI reiterates that 'excluded' is the superior wording) of the following

(b) a person who is convicted of a work-related offence;

(c) a person who is the subject of a civil penalty order in relation to contravention of a work-related provision;

80. A criminal conviction or a substantial fine are in themselves sanctions designed to have a deterrent effect which courts have regard to in determining penalties. It is not clear that further penalties or additional penalties or exclusions are required.

81. It may be appropriate to have some businesses effectively on probation or supervision, or subject to some conditionality or oversight, and the legislation should provide the Minister with additional options in this regard.

a. One option in this regard might be that a person found to have a contravention or subject to or a civil penalty by the Courts who does seek to employ further non-citizens is able to be made subject to the additional reporting obligations in 245AYA(5) for 24 months rather than the standard 12.

b. This would give the Minister an option other than prohibiting those who may have learned their lesson from employing migrant workers.

82. However equally the penalties in relation to criminal or civil offences can be significant and should offer retribution and deterrent without further prohibiting or excluding an employer. In practice the wrongs that would give rise to such penalties will in many cases see changes in management which would render an ongoing penalty or prohibition inappropriate and damaging.

83. We ask that this be taken into account both in formulating the law and in how it is administered at the ministerial level. We make this point whilst acknowledging they are some persistent recidivists, business models and conduct that demonstrate repeated patterns of exploitation of migrant workers. This small subset of employers would be excluded from access to the additional avenues and approaches we propose be added to the system.

Process for Declaration

84. The 28 days proposed in s 245AYD(6) may be insufficient time for an employer to properly contest a proposed prohibition or exclusion, and may unfairly rob the minister of material facts relevant to his or her decision making. It may also preclude employers from requesting an enforceable undertaking instead of a prohibition or exclusion.

85. We foresee circumstances where for example an employer is attempting to secure information from persons now resident overseas, or from former managers and employees which takes time. We appreciate the inclusion of s 245AYD(6)(b) but consider believe that it would be useful to allow a period more along the lines of 56 days for employers to make their response to any proposed prohibition or exclusion.

86. An alternative option that may be considered may be a default of 28 days, but the option of 56 where requested by an employer. In such circumstances the Minster might have discretion to freeze access on an interim basis to the hiring of new noncitizens for the extended period.

87. This would still risk being quite unfair and damaging to the employer and potentially to non-citizens wanting work where the proposed declaration is in error or on balance lacks merit, but at least the employer would gain time to properly tell their side of the story.

Recommendation 5: Allow Employers Sufficient Time to Respond

Allow employers that are proposed to be excluded 56 rather than 28 days to make a written submission to the Minister.

If necessary allow the Minister freeze, restrict or condition access to the employment of non-citizens on an interim basis while an employer is responding to a proposed sanction.

Reasons

88. We note s 245 AYD(7). It's not enough to simply give an employer a copy of a document declaring they are prohibited or excluded from hiring certain persons. Employers need written reasons and some identified basis to assess the veracity of the decision which has been made against them.

89. Part 2 of the Bill should require the Minister to issue the reasons or basis for their decision to exclude or prohibit an employer, to allow that employer to assess whether the decision has been made on a correct factual and legal basis, and whether they have additional information to provide, or to properly assess whether they want to seek a review through the AAT.

90. We recommend s 245 AYD(7) be fleshed out to detail the information the Minister must provide to an excluded or prohibited employer, just as the Fair Work Commission and Courts generally publish their reasons for decision.

Discretion / Considerations

91. It's also critical that employers be able to provide the minister with the full range of information necessary to make a decision on prohibition or exclusion. A Minister also needs to have the opportunity to take into account considerations such as:

    a. Any adverse effects on other jobs within the business.

    b. Any adverse effects on non-citizens who may have reduced opportunities to work.

    c. Any adverse effects on local communities and migrant communities.

    d. Any adverse effects on the sustainability of the business were it to not be able to access non-citizen labour.

92. A number of very major Australian employers have been subject to adverse findings and orders under Fair Work legislation, or at very least to undertakings where errors have been made.

93. There needs to be some scope / some tools for a minister to address a situation in which an outright prohibition or exclusion may do more damage or wider ranging damage that should be avoided. This includes potential harms to persons seeking a permanent migration outcome from an initial period of work as a non-citizen, and potentially subject to confirmation restrictions on the capacity of their potential employer to be a sponsor or facilitator of those migration outcomes.

94. Consider also the example of a meatworks attached to a country town, that for the purpose of the example has clearly breached obligations such that it could be prohibited or excluded.

95. Should that be the sole consideration? What if it meant the closure of the meatworks? What if an inability to employ further migrant workers who have proven to be the backbone of the business, and whose employment has proved critical to their successful incorporation into the local community, causes social and economic harm?

96. For the purposes of argument consider the potential relevance of that meatworks closing on the capacity of local farmers to have their cattle slaughtered and proceed for sale, or the impact on the local community were red meat to become unaffordable or inaccessible.

97. Aren't these the type of matters a Minister should be able to take into consideration, or more properly that should be set out in legislation to prompt employers facing potential exclusion or prohibition to enter into a dialogue with the Minister where they validly believe that such matters may be relevant, and that they should not be excluded or prohibited.

98. This is not to in any way excuse non-compliant or exploitive behaviour, and a Minister in such circumstances would be entitled to expect or extract necessary assurances or conditionality to preclude any repeat of the conduct which gave rise to the triggers for potential exclusion or prohibition.

99. But the minister and the potential employer should be able to enter a dialogue towards a supervised or restriction model short of outright prohibition or exclusion where on a cost benefit basis that would do more harm than good.

Recommendation 6: Ensure Employers Can Argue Against Adverse Impacts of Exclusion or Prohibition

Ensure the legislation allows the Minister to make a balanced and properly informed assessment about the impact of any proposed exclusion, taking into account not only the conduct which may give rise to exclusion, but also its impacts on the business, jobs, and communities including migrant communities.

Review

100. We welcome the prospect of a review of ministerial decisions by the AAT (s 245 AYD(11)), noting however this legal jurisdiction is fairly unfamiliar to many private sector organisations.

101. We recommend consideration be given to an initial or alternative avenue for ministerial review prior to going to the AAT .

102. So on reading the Ministers decision or declaration, an employer may wish to ask the Minister to reconsider based on the adverse impact of that prohibition either on their business or community, or on non-citizens they would be barred from employing. The employer may also wish to urge the Minister to give additional weight to particular matters.

103. Enforceable undertakings may account for such circumstances but it also seems relevant to allow an employer to request a ministerial review prior to appealing to the AAT.

104. The other thing that could emerge is a change in circumstances such that the merits of a particular business or employer being excluded or prohibited should be re-examined. For example management or ownership may change and a business could be bought out by another entity with a spotless record in their employment of non-citizens.

Casuals and Existing Non-Citizen Employees

105. Our understanding is that an employer would not be required on becoming prohibited or excluded to terminate the employment of their existing non-citizen employees, which would be obviously unfair on them and the business. The prohibition would be on employing new noncitizens for a period.

106. We believe this is clarified by the reference to the employment of additional noncitizens in s 245AYA(1). We request this be made even clearer in the Explanatory Memorandum.

107. But what of casual employees? Their engagement and employment is by the shift, end each shift in theory stands as a separate engagement. In practice of course many casuals are not new employees, and have previously worked as casuals for the employer, and for example have been trained and inducted, they may have a uniform etc.

108. Care needs to be taken to ensure any exclusion or prohibition that is intended to address perspective employment of knew noncitizens, does not inadvertently lead to existing casually employed noncitizens being kicked off rosters or not given further shifts after the date any prohibition comes into effect.

Publication

Discretion

109. The Minister needs discretion to not publish identifying details in particular circumstances. This might include situations in which a person's name may raise dangers of retribution, or in the unique considerations raised by work in domestic violence shelters and some social services.

110. Section 245AYF should be amended to ensure the Minister has discretion not to publish or to redact particular details.

Removal

111. Employers accept that adverse findings remain on public records from periods past. However the reasonable expectation of government is to keep information current and accurate. It seems quite legitimate to record that ABC Pty Lt did XYZ in a particular year. What is not legitimate is to leave ABC Pty Ltd on any list that purports to be or could be understood to be a list of those subject to current prohibitions or exclusions beyond the time in which such exclusions apply to ABC. Section 245AYF(6) needs to be re-examined in this light.

Recommendation 7: Ensure there is flexibility / discretion on publication

Ensure s 245AYF provides the Minister or Department with sufficient discretion to not publish, to publish in part or to redact where required.

Additional Reporting Obligations

112. Will be information in section 245AYG(2) be published?

113. We urge consideration of scope for the Minister to exempt particular employees or employers from this requirement, where merited, or to omit names from any published or discoverable information.

114. We note that this seems to be the only part of the Bill to expressly require an individual non citizen's name and details. We query for example situations in which someone might be fleeing domestic violence, or the employer is a domestic violence shelter, or there are other concerns or reasons that may warrant a level of secrecy and confidentiality.

115. This is not to seek to avoid an employer having to undergo something akin to a probation period of supervision following sanction or wrongdoing, rather it is to note that there can be very real and well merited reasons not to share employee names and details , and employers can be very staunch in what they feel to be their duties of confidentiality to their employees.

Anti-Discrimination Law

116. A consequential amendment is required to federal anti-discrimination law to indicate that an employer's refusal to interview or employ a particular person based on their visa status as a consequence of that employer being prohibited from employing them, or having a reasonable belief that they are prohibited from employing them, due to the making of an order under this part is not actionable under such legislation.

117. An employer subject to a bar or prohibition needs to be able to communicate that to all applicants or to non-citizen applicants without being liable under anti-discrimination law. This applies to the various propositions and powers under the Bill, and potentially to all Parts.

SCH.1, PART 2 – FAIR WORK ACT CONTRAVENTIONS

118. This section addresses the interaction between the proposed new prohibitions, or as they should be more accurately and fairly termed, exclusions, with the Fair Work Act and the Fair Work jurisdiction.

119. ACCI prioritises and separates these matters in our capacity as Australia's largest and most representative organisation of employers, the largest single nominating organisation of employers to the National Workplace Relations Consultative Council (NWRCC), and as a peak industrial relations body in this country.

120. This section addresses the considerations raised by proposed:

    a. Section 245AYA(2)(d)

    b. Section 245AYB

    c. Section 245AYD(4)(d)

121. We have extracted the table of Fair Work Act 2009 contraventions in s 245AYD(10) into a further section on Part 2 for clarity, which follows this section

Implement What the MWT Recommended

122. The relevant MWT recommendation is as follows:

> **Recommendation 20**
>
> 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.

123. The Government's Response to the MWT indicated that:

> The Government will start exploring mechanisms to exclude employers who are convicted by a court for underpaying migrant workers from employing new temporary visa holders for a specific period of time.

Confine this to underpayment

124. The MWT recommendation and the Government's acceptance of it were very specific, to link capacity to employ migrant employees to underpayment findings by a court.

125. ACCI's broad position is that this is what should be implemented, a link to underpayment findings, and not to any wider or other breaches of award conditions or Fair Work Act requirements. This means in essence stickling to dollars and cents / remuneration obligations.

126. This is not too excuse in any way other breaches, but it is to note that there is a great deal of complexity in the modern award system in particular which can give rise to orders for contravention even where the employer had no intent to deprive employees of entitlements, and indeed where they invest significant monies to not do so.

127. It is simply too easy under Australia's workplace relations regulation to make mistakes that harm both employees and employers, to the point where much of our employment law is fundamentally unsafe, and fails are regulatory duty to those who must comply with it.

128. As we outlined below in relation to s245AYD(10) it is quite possible with only relatively minor amendments to properly focus the proposed Part 2 of the Bill on underpayments in accordance with the MWT recommendations end the Government's express acceptance of them to date.

Section 245AYA(2)(d)

129. This should be amended as follows to give effect to what the MWT recommended and Government accepted:

> (d) a person who is the subject of an order for contravention of ~~certain~~ civil remedy provisions under the Fair Work Act 2009 for the underpayment of wages ~~in relation to the employment of~~ to a non-citizen.

130. We also raise a temporal question. This is expressed in the present tense, that the person is the subject of an order. ACCI's understanding is that the court makes orders, and an employer performs the requirements of those orders, to both make a back payment and to pay a pecuniary penalty (fine) for the civil contravention, but the order is then discharged.

131. So if an employer is subject to an adverse court finding on X date and has for example 28 days to make the required payment, we question whether after those 28 days (and presuming payment is made) it is accurate to say that employer is then subject of an order. The order was made, the payment was made, the order was discharged and becomes a purely historical matter or finding. The present tense 'is the subject of" then becomes questionable.

132. If this is not accurate, and the present formulation based on 'is' extends to previous decisions, how far back can those decisions go? This seems a quite fundamental matter for clarification, and we outlined below in relation to s 245AYD(4) an approach based on consideration of decisions up to two years old, and on exceptional basis up to five years old, which seems far clearer and fairer.

133. Were such an approach adopted it should also be applied to section 245AYA.

Recommendation 8: Confine to Underpayment

The Bill should attach prohibitions or exclusions to underpayments / contraventions of remuneration related provisions of the Fair Work Act only, and not to other breaches / matters.

Section 245AYB(b) - Meaning of Employs

134. Employment should essentially always be given its natural and proper meaning in our law, which is based on contracts of service and not any wider meaning, and not contracts for services.

135. The proposed section is respectfully a nonsense in employment law terms. It is dreaming something (a contract for services) something it is not (a contract of service).

136. There has been more than a century of debate about the delineation of B from A, but only the most extreme formulations or proposals seek to declare B to be A.

You cannot underpay a non-employee

137. Part 2 needs to address only employment. It is only in relation to employment that is in any way sensible to talk about someone being underpaid. Where there are failures to meet negotiated contractual amounts for contracts for services, rather than of service, that is pursued through the commercial law not through employment or migration law.

138. Proposed section goes beyond what the MWT recommended, and beyond what former Minister O'Dwyer agreed to implement. It is not surprising that this course of action was not recommended it is not legitimate or sustainable at law, or in practice.

139. You simply cannot underpay somebody who is not employed.

Which contractors is this trying to get at?

140. In addition to controversy and complication, it is not clear why this would be attempted, and in relation to whom?

141. What particular circumstances or case examples give rise to the attempt to include contracts for services and independent contracting within the scope of Part 2 of the Bill? We would like to know of the wrongs that are being addressed here, to assess and respond to the benefits versus harms, but also to think about whether there are other ways to address any valid concerns to the extent they are merited and of sufficient frequency to belong in this set of measures?

142. Is there a problem with platform work? With rideshare or home delivery? Is there a problem with tradies who are independent contractors? Which independent contractors are at issue here, or has this been included in the Bill through some misguided assumption that comprehensiveness is require? If the latter were the case this should be abandoned immediately in favour of a focus purely on the employment relationship.

143. We note in particular in relation to some platform work, such as ridesharing and home delivery that slamming the door on non-citizens' access to such work may have massive and dire consequences for the noncitizens and for local communities. Without access to this form of income cheering pandemic and lockdown in 2020 and 2021 some on student and holiday visas may literally have starved.

144. How many visa holders and noncitizens are working under contracts for their services, opposed to contracts of service as employees, How many of them are unhappy or aggrieved at such an arrangement, and how many of them would fit within the factual circumstances of for example proposed s 245AYD(4)(a) to (c)?

    a. Paragraph 245AYD(4)(d) cannot be relevant because in each case the particular area of the Fair Work Act 2009 applies solely to employment.

Natural meaning:

145. Employment or the verb employs should at all times have its natural meaning, and legislation should avoid attempting to qualify or further define the concept unless strictly necessary.

146. Employ means an employer employing an employee in an employment relationship under a contract of service, end of story. Any drafting which attempts a different course is genuinely like Pandora prying open the lid of the box, and ACCI is strongly opposed to creating damage and opportunism in employment law through any mis-drafting in migration law.

147. This concern reflects precisely why we raise earlier that this should have gone to the COIL process under the NWRCC prior to any introduction into parliament.

148. We will set out directly why Part 2 should relate only to contracts of service, but even in the situation that Part 2 was to extend to both employment and independent contracting, The execution is wrong in 245AYB.

149. If directly contrary to the position we are putting, and the Government did want to pick up both different modes of working, the way to do this would be:

    a. To omit any attempted (re)definition employment or employs.

    b. Reframe Part 2 as an exclusion from both (i) the employment of non-citizens by ministerial declaration, accompanied by a capacity to also declare (ii) that a person should not be able to contract for the services of another person, being a non-citizen, in their individual capacity.

150. Rather than seeking in a shorthand way that would be highly damaging and contentious to redefine the meaning of employs, the superior approach would be to talk about a prohibition on employing noncitizens as well as a prohibition on agreeing contracts for services with individuals who are non-citizens for the prescribed period.

Recommendation 9: Contracts of service / employment only

Section 245AYB and the application of any prohibitions / exclusions in Part 2 should apply to employment (contracts of service) only and not seek to extend to independent contracting (contracts for services). There should be no attempt to mis-define employment or employing to include independent contract relationships.

Domestic Work In Family Homes

151. ACCI does not generally represent families or householders in relation to domestic workers, whatever legal relationship they work under. We do however, in a similar way to the ACTU, engage with domestic work at the global level through our role in the International Labour Organisation, and in the framing of domestic legislation, often by way of exclusions. We have also previously sought to secure greater clarity on visa arrangements for au pairs.

152. We look forward to the Explanatory Memorandum providing the basis for the proposed exclusion of domestic work from s 245AYB(b), but in doing so wish to raise three (3) matters at this stage:

153. The first matter is the slavery case in the state of Victoria which was before the courts in recent months:

Melbourne couple found guilty of keeping Tamil woman as a slave for eight years

Posted Fri 23 Apr 2021 at 3:51pm, updated Fri 23 Apr 2021 at 8:09pm

154. This was a very serious criminal matter and the future employment of non-citizens is the least of the offenders' worries, but within government the AFP, Border Force and other teams that address forced labour and slavery should be consulted on the consequences of excluding domestic work as proposed, were s 245AYB to proceed as presently formulated.

155. Consideration also needs to be given to the sex work industry's legitimate and illegitimate employment of noncitizens in this context, and again AFP and Border Force experts should guide the approach. Specifically they should be asked whether they agree to the exclusion of domestic work and the consequences they see of such an approach.

156. The second is one of construction, and the linking of the domestic work context solely to proposed s 245AYB(b) and to non-employment contracts for services as currently drafted.

157. We appreciate governments are always very gun shy of regulating cleaners, gardeners etc that work for Australian families on a very informal basis, but equally we don't see why any domestic work exemption would be solely based around contracting rather than direct employment.

158. ACCI is not clear that there needs to be any exemption for domestic work, and considering the Victorian slavery case we urge the taking of advice from Border Force and the AFP, including whether forced labour is occurring in employment relationships or other contractual relationships, and whether the forcing is being done by persons who would be picked up by any prohibitions or exclusions as proposed in Part 2.

159. The final issue is non-citizens doing work in domestic homes for a business. What of noncitizens, such as working holidaymakers or students who work in domestic homes, as au pairs, or for a cleaning or gardening company, either as employees or sub-contractors?

160. Is it the intention that if XXX Home Cleaning underpays, is subject to a civil penalty order in relation to a work related contravention or offence relating to a non-citizen, the prohibitions in Part 2 will not be able to apply to them because all the work that gave rise to the contraventions occurred in a domestic context, as will all their future work?

161. That seems an odd outcome, where one cleaning company could be excluded or prohibited as it cleans officers or commercial premises, and a second cleaning company committing the same wrongs could not be excluded because it cleans family homes.

162. Definition: Consideration also needs to be given to whether domestic context requires a definition to resolve ambiguity, and whether 'domestic work' may be more accurate than 'domestic context'.

163. Don't Exclude Domestic Work: The other option is to not exclude domestic work, particularly thinking about the slavery example in Victoria. Government may wish to consider omitting outright any references to domestic context or domestic work from s 245AYB however formulated. This may be much simpler and allow proper consideration for domestic work where required.

164. The best way to include such work seems to be removing any reference to it., which would see s 245AYB as follows:

> **245AYB Meaning of *employs***
>
> For the purposes of this Subdivision, a person employs a non-citizen if, and only if the person employs the non-citizen under a contract of service.

Section 245AYD(4)(d)

165. This is as follows:

> (d) both:
>
> (i) the person is the subject of an order made under the Fair Work Act 2009 for contravention of a civil remedy provision (within the meaning of that Act) covered by subsection (10) of this section; and
>
> (ii) the contravention is in relation to an employee who is a non-citizen.

166. We emphasise the critical importance of (4)(d)(ii) which provides essential clarification and targeting.

167. This does not require amendment to refer solely to underpayments, as the proper approach to s 245AYD(10) we outline in the next section will confine this to what the MWT recommended.

168. Temporal concern: Section 245AYD(4)(d)(ii) is in the present tense, for an employee who is a non-citizen. ACCI's understanding is that underpayment contraventions often occur in the non-citizen context in relation to persons who complain after employment has ceased, or even after a person has returned overseas.

169. We also understand that many people leave their former jobs during the course of pursuing underpayment with the FWO and through the courts.

170. The query is whether 245AYD(4)(d)(ii) should be in the present tense, or also the past tense?

171. Being pedantic, there is also the situation of a contravention in relation to a person who was a non-citizen at the time the Fair Work act was breached, but subsequently became a citizen.

This Needs Time Limitations

172. The operative parts of Part 2 require greater precision as to the time at which orders can trigger a ministerial declaration.

173. The best way to illustrate this point is by way of proposed amendments, as follows:

> (4) A person is covered by this subsection if:
>
> (a) the person is an approved work sponsor who is subject to a bar for a specified period imposed by the Minister under paragraph 140M(1)(c) or (d); or
>
> during the 24 months prior to the giving of the written notice set out in (5):
>
> (b) the person ~~is~~ was convicted of a work-related offence; or
>
> (c) the person ~~is~~ was the subject of a civil penalty order in relation to the contravention of a work-related provision; or
>
> (d) both:
>
> (i) the person ~~is~~ was the subject of an order made under the Fair Work Act 2009 for contravention of a civil remedy provision (within the meaning of that Act) covered by subsection (10) of this section; and
>
> (ii) the contravention ~~is~~ was in relation to an employee who is a non-citizen.
>
> (X) The Minister may also declare a person to be an ~~prohibited~~ excluded employer based on the matters set out in (4) for a period prior to the giving of the written notice set out in (5) of 5 years in exceptional circumstances, having given the person written reasons for that decision.

174. As it presently reads the Minister could declare an employer in relation to civil penalties and Fair Work Act 2009 breaches dating back any period, which is ambiguous and potentially unfair.

175. It would be far clearer to identify which breaches wrongs will trigger this process, by way of a time-based limitation, which would cover as set out above:

a. Court orders handed down within the last 2 years (even where the conduct occurred prior to that).

b. Or in exceptional circumstances, add a ministerial discretion to make a declaration based on preceding findings, up to 5 years old.

176. For completeness, were a Minister to want to act on findings or breaches more than 24 months old, this supports our view that a person should have 56 days to respond, rather than 28. The longer you go back , the harder and more time consuming it is for the current generation of leadership open organisation to discern facts.

Recommendation 10: Clarify conduct that can trigger prohibition / exclusion

Amend s 245AYD(4) to clarify that the offences or civil penalties matters that can give rise to an employer's prohibition or exclusion under Part 2 should be restricted to those in the preceding 2 years, or in exceptional circumstances up to 5 years.

Enforceable Undertakings

177. ACCI's understanding is that the orders referred to in Part 2 relation to the Fair Work Act 2009 are orders of the Court in listed civil penalty matters and do not extend to enforceable undertakings under that legislation. We support such an approach, and also the exclusion of circumstances in which an employer may make a contrition payment without the recording of a breach or contravention.

178. It is important that compliance measure mechanisms remain graduated, and that the FWO has practical tools to encourage employers to work with it.

179. There is an important opportunity for the threat of exclusion or prohibition from the further employment of non-citizens to be used by the FWO to educate and encourage compliance where initial or non-grave concerns emerge, and using enforceable undertakings with employers of noncitizens to further control and discourage unacceptable conduct before it becomes conduct of sufficient gravity and harm that could give rise to exemptions or prohibitions.

180. Were the practical outcome of these amendments was more employers found to be doing the wrong thing in underpaying noncitizens being willing to work with the FWO and use whichever mechanisms the FWO deems appropriate, including either enforceable undertakings or the threat of them, that would be a positive outcome.

SCH.1, PART 2 – S 245AYD(10) TABLE

181. Proposed s 245AYD(10) is as follows:

Provisions of Fair Work Act 2009

(10) For the purposes of subparagraph (4)(d)(i), the civil remedy provisions of the *Fair Work Act 2009* set out in the table below are covered by this subsection.

Civil remedy provisions of the *Fair Work Act 2009*		
Item	**Subject**	**Provision**
1	Contravening the National Employment Standards	Subsection 44(1)
2	Contravening a modern award	Section 45
3	Contravening an enterprise agreement	Section 50
4	Contravening a workplace determination	Section 280
5	Contravening a national minimum wage order	Section 293
6	Contravening an equal remuneration order	Section 305
7	Method and frequency of payment	Subsection 323(1)
8	Method and frequency of payment—particular method	Subsection 323(3)
9	Unreasonable requirements to spend or pay amount	Subsection 325(1)
10	Unreasonable requirements to spend or pay amount—prospective employment	Subsection 325(1A)
11	Employer must comply with guarantee of annual earnings	Subsection 328(1)
12	Employer must comply with guarantee of annual earnings for period before termination	Subsection 328(2)
13	Employer must give notice of consequences of guarantee of annual earnings	Subsection 328(3)

182. ACCI's strong position is that this should be restricted to underpayments as recommended by the MWT and as accepted by former Minister O'Dwyer shortly prior to the 2019 Election.

183. We also note with approval proposed s 245AYD(4)(d)(ii) which provides significant clarification and comfort to employers on how this would operate.

Table Item 1 - Contravening the NES (FW Act s 44(1))

184. This should be deleted from the table in proposed s 245AYD(10).

185. The NES are not payment provisions, and underpayments are separately actionable the Fair Work Act 2009. To include the NES with all their myriad complication (and in many parts tests based on subjective notions such as reasonableness) significantly exceeds what the MWT recommended and Government agreed to implement.

186. There are 11 NES many of which address procedural matters, such as rights to request, or to discuss changes in hours. Neither these provisions nor leave rights are pay obligations and breaches of them are not underpayments.

187. Employers are not downplaying the seriousness of breaching the NES. We are however emphasising that the sanctions for those breaches are already significant, such breaches do not relate to payment, and there is no nexus between them and an employer's capacity to employ a non-citizen (the matter Part 2 goes to).

188. We fail to see for example how breaches of the mechanisms of returning from parental leave, or an underpayment of redundancy pay, or a misunderstanding of pay in lieu of notice should give rise to exclusion from the future employment of non-citizens.

Table Item 2 - Contravening a Modern Award (FW Act s 45)

189. This is too broad. Many award breaches are not underpayments, do not fall within the MWT recommendation, nor within what the Government said it would do in its response to the MWT.

190. We examined the General Retail Industry Modern Award 2020, and made a very rough division of its terms into those which directly influence or determine the money that goes into an employee's pay packet (which may give rise to an underpayment-based order) and those which address non pay matters.

191. The following is not complete, but it gives a sense that awards contain both pay an non pay matters, and that breaches of awards can extend well beyond underpayment matters:

Payment and related clauses	Other clauses
11. Casual employees (the loading) 13. Junior employees 14. Classifications 17. Minimum rates 18. Payment of wages 19. Allowances 21. Overtime (pay) 22. Penalty rates 23. Application of Part 24. What is shiftwork 25. Rate of pay for shiftwork 30. Parental leave and related entitlements 31. Community service leave 33. Public holidays (pay)	5. Individual flexibility arrangements 6. Requests for flexible working arrangements 7. Facilitative provisions 8. Types of employment 9. Full-time employees 10. Part-time employees 11. Casual employees (other) 12. Apprentices 15. Ordinary hours of work and rostering arrangements 16. Breaks 20. Superannuation 21. Overtime (process) 26. Rest breaks and meal breaks (Shiftwork) 27. Rostering restrictions (Shiftwork) 28. Annual leave

	29. Personal/carer's leave and compassionate leave 32. Unpaid family & domestic violence leave 33. Public holidays (arrangements) 34. Consultation major workplace change 35. Consultation about changes to rosters or hours of work 36. Dispute resolution 37. Termination of employment

192. Employers are not saying that awards should be lightly breached or breached without consequence. Rather we are saying that where the courts have acted on a breach and made orders in relation to it, but that breach is not over remuneration or pay determining provision of the award but on another matter or a matter of process, that should not give rise to consideration of prohibition or exclusion of work with non-citizens (i.e. Part 2 of this Bill).

Table Item 3 - Contravening an EBA (FW Act s 50)

193. The identical point arises in relation to Enterprise Agreements (EBAs), and to an even greater extent requires more precision than Item 3 in the table would provide.

194. Firstly, EBAs take already often difficult to comprehend and apply drafting in awards, and hand it to unions and individual employers to make a bespoke attempt to put their own spin on what the Commission was attempting to capture.

195. The imprecision of drafting in EBAs, particularly where the original settlements that led to them break down or are begrudged by one party, can translate into court actions to enforce the EBA. Adverse courts decisions do arise from poor understandings of negotiations and poor drafting rather than conscious underpayment or exploitation.

196. Secondly, Court actions on EBAs often involve failures of process and consultation driven by trade unions as opposed to any realistic conception of underpayment. So the dollars and cents of an EBA may be fully observed but the purported breach is in relation to consultation or dispute settlement, or some non-monetary benefit. Such standard industrial relations division and friction should not give rise to any prohibition or exclusion of an employer from capacity to work with non-citizens.

197. Thirdly, the content of EBAs Often exceeds what could be put into an award. EBAs often contain aspirational commitments or consultation commitments and these matters can at least in theory also give rise to breaches of the ABA. This makes it even more important that the enforcement mechanisms that can give rise to actions under the Migration Act be affectively limited to those relating to remuneration and to payment and underpayment, and not to other matters.

Table Item 4 - Contravening a Workplace Determination (FW Act s 280)

198. This needs qualification, and narrowing. Where a court order made under section 280 is in relation to the contravention or determination relating to wages and a finding of underpayment, this would be germane to the recommendation of the MWT and the policy commitment from Government to give effect to it.

199. However it is clear from Part 2-5 of the Fair Work Act that workplace determinations will often or perhaps always include both terms and conditions of employment, as well as mechanical terms such as dispute settlement and consultation provisions. Such matters do not relate to payment or underpayment, and should not properly give rise to the subspecies of court orders that may be germane to any prohibition or exclusion of rights to hire non-citizens.

200. For example a court order that an employer failed to comply with the consultation terms of some form of workplace determination, including in this instance of failure to consult with a non-citizen or their representative may give rise to a civil penalty, but should not give rise to an exclusion or prohibition under Part 2 of the Bill. Failure to follow a process set out in a workplace determination is not an underpayment and should not be linked to the future hiring of noncitizens.

201. How to fix this? We see two options:

a. Further detail may need to be added into the table in relation to Items 2, 3 and 4 in the table to indicate that it would only be Court orders in relation to contraventions of the remuneration or payment provisions of a Modern Award, EBA or Workplace Determination that could trigger potential exclusion or prohibition; or

b. A catch all clarification could be added to the introductory paragraph of s 245APD(10) along the lines of the following (backed by clarification in the Explanatory Memorandum):

> *Provisions of Fair Work Act 2009*
>
> (10) For the purposes of subparagraph (4)(d)(i), the civil remedy provisions of the *Fair Work Act 2009* set out in the table below are covered by this subsection, insofar as they relate to remuneration, wages, pay and terms of employment, and not in relation to non-wage conditions of employment or any other matters.

c. Specific advice would be needed from the AG's Department team responsible for the Fair Work Act 2009 to most effectively capture this distinction. Section 139 of the Fair Work Act may be instructive in this regard as it outlines that awards contain both remuneration matters and non-remuneration matters (types of employment, breaks, leave, superannuation and procedures for consultation, representation and dispute settlement).

Table Item 5 - Contravening National Minimum Wage Order (FW Act s 293)

202. ACCI does not oppose Court orders made in relation to the National Minimum Wage Order giving rise to potential exclusions as provided for under Part 2. These are simply another form of default or catch all minimum wages in addition to the minimum wages contained in Modern Awards.

203. We are not sure in practise whether any noncitizens work under the national minimum wage or the order, and in particular whether noncitizens with a disability can do or can work under the special minimum wages provided in the order. Regardless these are minimum wage provisions directly relevant to payment or underpayment, so they do legitimately belong in the table consistent with government policy and the recommendations of the MWT.

Table Item 6 - Contravening An Equal Remuneration Order (FW Act s 293)

204. ACCI does not oppose Court orders made in relation to an Equal Remuneration Order giving rise to potential exclusions as provided for under Part 2. These are remuneration orders and therefore relevant to potential underpayment.

Table Items 7 and 8 - Method and Frequency of Payment (FW Act s 323)

205. ACCI does not oppose Court orders made in relation to the method and frequency of pay giving rise to potential exclusions as provided for under Part 2.

206. This is either fundamental to payment or underpayment, or it is appropriately incidental to payment or underpayment.

Table Item 9 and 10 - Unreasonable Requirements to Spend/Pay (FW Act s 325)

207. ACCI does not oppose Court orders made in relation to such unreasonable requirements giving rise to potential exclusions as provided for under Part 2.

208. Our understanding is that this provision is in the Fair Work Act 2009 precisely to address unacceptable situations such as the cash back or intimidation arrangements which in part gave rise to the MWT.

209. However, it is again important that employers have an opportunity to respond to any proposed exclusion or prohibition. There are quite legitimate reasons why an employer may deduct monies from the pay of non-citizens Including in relation to food and accommodation in sectors such as agriculture and tourism, which can give rise to disputation. Our understanding would be that such deductions would be reasonable and therefore not be caught up in adverse court findings but there may be situations in which a Minister would need to listen to an employer seeking to contextualise or explain the relevance that they say should attach to such a finding in relation to a possible prohibition or exclusion.

Table Items 11 to 13 - Guarantee of Annual Earnings (FW Act s 328)

210. ACCI does not oppose Court orders made in relation to breaches of any Guarantee of Annual Earnings which an employer has chosen to make giving rise to potential exclusions as provided for under Part 2.

211. It is however that important that employers have an opportunity to respond to any proposed exclusion or prohibition as these may be subjective or contested matters or matters in which employers consider further information may weigh against attaching a further sanction to them.

Recommendation 11: Confine the triggering civil remedy provisions to those directly relating to remuneration only (s 245AYD(10))

The civil remedy provisions of the Fair Work Act 2009, the contravention of which can give rise to exclusion / prohibition under Part 2 should be restricted to underpayments, and breaches of instruments that set rates of pay in relation to underpayments, and to matters directly associated with remuneration.

Fair Work Act breaches in relation to non-wage conditions of employment or any other matters should not be able to give rise to prohibition or exclusion under Part 2.

Recommendation 12: Amend the table in s 245AYD(d)(10)

Delete Item 1 – NES

Clarify Items 2, 3 and 4 that it is only breaches of the pay and remuneration provisions of modern awards, enterprise agreements, and workplace determinations that should be able to give rise to any exclusion or prohibition provided for in Part 2 of the Bill.

Other breaches / other civil remedies in relation to conditions (rather than pay) or procedural requirements should not be able to trigger the exclusion or prohibition process or sanctions

SCH.1, PART 3 – COMPUTER SYSTEM VERIFICATION (VEVO)

Threshold Clarification

212. The essence of these amendments seems to be the requirement in proposed s 245AA(1)(c)[14] for an employer to verify that someone who presents to them for work has the required permissions for work, having checked on the Government's VEVO computer system.

213. It is not clear to ACCI:

a. The extent to which employment in Australia is currently subject to VEVO checks. Our working understanding is that some employers are very familiar with VEVO and it is a standard stage in their pre-employment practices, but many other employers may be unlikely to even know of the online system. Government may have information on the usage of VEVO and how widely it is known throughout the business and employee community that could usefully be shared to inform consideration of the Bill.

b. Whether all employment in Australia would in future require a VEVO check following the proposed amendments. This seems an unacceptable ambiguity given the two-year jail terms in the Migration Act.

214. Or is this only relevant where someone employs migrants, where an employee or applicant may be a migrant or there's a reasonable apprehension that they are a migrant? This ambiguity needs to be resolved. There needs to be clarity on which employers need to demand a VEVO check, in which circumstances, from which applicants or job starters.

215. Our broad brush understanding is that VEVO checks are not a standard part of the employment process in Australia. They would be for many enterprises, but many more Australian employers that have not employed a visa holder or engaged noncitizens may have no idea that VEVO exists.

216. We stand to be corrected on this, and we would be very interested in any market testing government may have undertaken to confirm this one way or another – how widely used is VEVO now, and what percentage of employment is preceded by a VEVO check? What percentage of all employers are registered to use VEVO?

217. **The key threshold questions that must be answered include**:

a. Is the effect of the amendments in Part 3 that **every employer of every new employee in Australia needs to do a VEVO check** even where the new employee is presenting to them as having Australian work rights, or the employer has a reasonable basis to believe that they have Australian work rights?

[14] Bill, Item 13

b. **If that's not the case, in which circumstances will employers have to run VEVO checks, and in which is this not necessary, and how will they know this?**

c. **Can employers ask as a standard practice whether each new starter or job applicant is an Australian or NZ citizen or permanent resident?** Can employers demand to see and make a copy of a passport before work commences? What do they do for those without a passport, which is more likely for younger employees? (Noting that citizens' and permanent residents' passports are rapidly expiring as overseas travel becomes a non-consideration during COVID).

218. Consider proposed s 245AEC. It appears to create a liability for a $10,000 fine for allowing any person to commence work without firstly undertaking a VEVO check. There does not appear to be a definition of 'worker' in the present Act, nor is this addressed in Item 1 of the Bill in amending Section 5 of the Act. **Is it the case that each and every hiring in Australia will require a VEVO check prior to commencement, and that where that does not occur the employer would or could be subject to a $10,656 fine**?

219. On its face s 245AEC appears to create a liability where an employer employs someone they went to school with or grew up with, or even a family member, and fails to subject that person to a VEVO check. Is this correct or incorrect?

220. If this is incorrect, how is it incorrect, and where in the Act as it is, or in the amendments is this clarified? Where would an employer or someone seeking to advise them go for guidance on this issue? Where is there a delineation in legislation of which employees and which employment this requirement is to apply to?

This Seems Huge

221. Roughly 200,000 additional jobs are created per year in Australia.[15] Given that many leave jobs and gain new jobs, there would be well over 200,000 job commencements per year. To the extent that there is a universal expectation of VEVO checking for all employment, this would be a very widespread new obligation.

The Government is Sending A Contradictory Signal

222. The Government presently sends a clear signal to Australian citizens and their employers that they should have no regard to VEVO.

> *Australian citizens have unlimited rights to work or study in Australia. You cannot use VEVO to confirm this. You can provide a copy of your Australian citizenship certificate or your Australian passport to prove your citizenship.*[16]

223. So what is an employer to make of this? How are we to know which employees to do a VEVO check for, and when it is not required?

[15] https://www.abc.net.au/news/2018-04-16/australia-on-track-1-million-new-jobs-since-2013-where-are-they/9597470?nw=0
[16] https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online

Recognise Discrimination Risks

224. To the extent that this becomes a requirement for all employment in Australia Government needs to recognise the dangers of sending unacceptable and damaging signals to employers, and the risks of inadvertently inviting discrimination.

225. If an employer is at risk of two years jail for erroneously employing somebody who is ineligible in migration law or not sufficiently checking an employee's work rights (where such an employer may never have checked work rights before or even understood themselves to be triggering any accountabilities under the Migration Act) then that employer may well shift to using VEVO as intended.

226. Equally, some employers are going minimise their risks by not hiring somebody they perceive to be a non-citizen. The danger of some employers assuming (even subconsciously) that they can minimise risk by employing or not employing people with particular characteristics should not be dismissed.

227. Discrimination concerns and claims may also be raised where employers seek information at the application stage on someone's migration status In clarification or consequential amendment of discrimination law might be required where that is an obligation. That may well become an obligation where an employer is excluded or prohibited from employing noncitizens, as it is in everyone's interests to signal to applicants that they should pull out of a process in which they cannot ultimately win a job no matter what their merits where they are a non-citizen.

Where Did the MWT Recommend This?

228. We have reviewed the final MWT report, and whilst we can find various references to VEVO, we can find no recommendation for the mandatory use of VEVO as proposed in Part 3.

229. VEVO was clearly known to the MWT, but we cannot see a recommendation that it be applied as proposed in this part of the Bill. Is ACCI correct in this characterisation? On what basis does the government seek to make VEVO checks all but mandatory raising the confusing ambiguities outlined above?

Recommendation 12: Better clarify when VEVO checks will be required

Clarify whether all employment will require a pre-engagement check on VEVO, or only those of non-citizens.

Clarify how employers should apply such a requirement in practice to avoid new fines and anti-discrimination claims.

Reasonable Satisfaction

230. The following compares the existing standard exemptions from offences in s 245AB(2), 245AC(2), 245AE(2), and 245AEA(2), with the proposed substitute provisions in Items 15 to 18 of the Bill:

Existing	Proposed
(2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times to verify that the worker is not an unlawful non-citizen, including (but not limited to) either of the following steps:	(2) Subsection (1) does not apply if the first person is, and continues to be, reasonably satisfied that the worker is not an unlawful non-citizen on the basis of information obtained:
(a) using a computer system prescribed by the regulations to verify that matter; (b) doing any one or more things prescribed by the regulations.	(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

231. These do not seem minor changes.

a. What is the impact of replacing a requirement to take reasonable steps for verification with being reasonably satisfied? Does that mean that an employer could take what would be objectively reasonable steps but still not discharge themselves from criminal liability?

b. Losing a 'reasonable steps'-based obligation in which an employer can argue the reasonableness of their actions in particular circumstances, in favour of a prescriptive approach in which the only way someone can be reasonably satisfied over an employees' status is using the VEVO system, seems less practical and adaptable to real world circumstances.

c. We are not clear what the impact would be of the temporal change.

d. Under the status quo the employer needs to be satisfied at reasonable times, which presumably would always include the point of engagement, and perhaps if the employment is extended at a reasonable further time given knowledge of actual or usual visa expiry or renewal.

e. Under the proposed approach an employer would have to continue to be reasonably satisfied in all cases at all times. What does this mean in practice – monthly VEVO checks? Not needing to do a VEVO check until a time stated on VEVO? This needs to be clarified. Could VEVO email registered employers reminding them they need to check it?

f. Why would the Government give up existing 2(b) allowing it to prescribe additional things that could be done in satisfaction of the requirement? Isn't that simply a safety net capacity to keep this practical and on track when required based on experience? ACCI recommends the current capacity to prescribe in regulation additional measures that constitute reasonable steps be retained.

Further Ambiguity s 245AEC

232. There is another ambiguity raised by s 245AEC:

> 245AEC Verifying permission to work—starting to allow non-citizens to work
>
> A person (the first person) must not start to allow another person (the worker) to work unless the first person has determined whether the worker would have the required permission to do that 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.

233. What is the triggering action here, and what are the consequences for the sensible and practical application of the law? What does it mean to start to allow a worker to work?

234. The law knows of contractual negotiation, and of offer and acceptance in regard to employment. The law is also aware of the wage work bargain, and the commencement of service in exchange for reward. In anti-discrimination legislation we have also added legal obligations and liabilities prior to any offer or acceptance , in for example regard to discriminate treat advertising of jobs or recruitment and selection processes.

235. But when does an employer 'start to allow someone to work'? Ask a dozen employment experts and you'll probably get a dozen answers because this is not a known or accepted concept.

236. It's not clear to us temporally or in the logical sequence of events to commence an employment relationship what the concept of 'starting to allow another person to work' constitutes? Is that at the point of greeting someone on their first day of work, is it at the point in which there is offer and acceptance, or is it at some other point? Some may argue they start the process of allowing someone to work when they get internal sign off on advertising a job or offering a position – even before any ads are posted or interest sought.

237. Unless we are missing something, isn't this drafting much clearer? (not that we agree to the content or intent of the provision).

> 245AEC Verifying permission to work~~— starting to~~ allowing non-citizens to work
>
> A person (the first person) must not ~~start to~~ allow another person (the worker) to commence work unless the first person has determined whether the worker would have the required permission to do that work on the basis of information obtained:

238. We recommend this whole idea of 'starting to allow' something be avoided in drafting; it seems a guilt edged invitation to litigate against employers, and almost certainly to confuse.

Required System User s 245APB

239. This point aside, we believe we understand the wider intention here, in our wording, an employer may be subject to mandatory VEVO checking where:

a. They have been subject to adverse findings and sanctions in the previous 12 months – which the Bill refers to as a prohibited employer, but it is more accurate to refer to as an excluded employer (s 245APB).

b. The employing organisation or person is part of a class of such persons declared to require that additional / mandatory reporting (s 245APD).

c. The employing organisation or person is specifically declared to require that additional / mandatory reporting (s 245APD).

240. We have various concerns with these provisions:

241. Prohibited Employers (s 245APB(a)).

a. Will there be ministerial discretion for someone who falls within this category to ask to not be subject to the strictures of being a required system user? What if for example there's been an entire change of management or ownership? What if the leadership that made the previous errors or breaches was specifically replaced on the basis of having done so by new leadership specifically charged with securing full and open compliance?

b. What of a situation where an employer wants to argue to government that the status to be accorded to it would be prejudicial or damaging , either to the employer or to potential employees?

c. The point of raising such concerns is that there may be exceptions or exemptions unique circumstances and we ask that they be some avenue or fail safe to account for them and deliver an appropriate outcome in such situations.

242. Prescribed Classes (s 245APC).

a. Will there need to be demonstrated misuse or omission before the minister may reasonably be satisfied of the necessity of imposing such an additional requirement on a class of employers, or those who refer for employment? Will this be responsive or preventative, and in which circumstances would the different approaches apply?

b. What notice will an industry or sub industry or set of employers have that this option is under consideration? What opportunity is built in to such a process for the industry to be heard? Who would be heard from such an industry?

c. What expectations or limitations might there be on how a class of persons is framed for the purposes of this? Would a declaration refer to, for example, every business in a given ANZSIC code or sub code? Would it be an entire industry or an industry within a particular geographic area?

d. Would misuse for example by bespoke bootmakers in WA justify imposing this requirement on all bespoke bootmakers throughout Australia? What evidence would be required to make such an extrapolation and how could it be critiqued by the industry?

e. How representative or common would misuse have to be before an entire class could be declared as envisaged in this section?

f. Is the class going to solely be defined by the industry or area in which the employer operates, or is there any prospect of the class being defined or sub defined by the employment of particular trades or occupations, or even migrants from particular nations or regions?

g. If for example the bespoke bootmakers of WA had been found to not be undertaking sufficient checks in relation to the employment of non-citizen bootmakers from Liechtenstein, but they had for San Marino, Monaco, and Luxembourg, would the prescribed class apply to all such bootmakers in WA , or would it be more topical to the particular migrant subclass in which problems occurred?

243. Specific users (s 245APD).

a. Will the declaration provided to the specific system user detail the basis upon which they have been singled out or accorded additional examination and requirements by the Minister? It seems as in matter of natural justice and proper administration that somebody sanctioned in this manner:

i. Is informed as to why that has occurred and the basis for the declaration not just the fact of the declaration being made.

ii. Is able to argue that decision, were it for example to be based on the wrong facts, or on circumstances that have changed, or based on only partial information.

b. Will there be a mechanism to correct ministerial or departmental error through the revocation of such a declaration without a requirement for AAT review as set out in s 245APD(5)? Will it be the case that genuine mistakes can be redressed simply and immediately were errors made?

c. Has advice being sought from OBPR or the Commonwealth Auditor General for example on whether this represents good practise and a transparent and suitably open and contestable process given the impact it may have on both employers and job seekers?

d. What does the use of the word person here mean if anything , where the word employer might alternatively have been used, and a second construction for those who refer?

Beyond a direct employer and somebody who refers somebody else for work, is anyone else picked up in this or intended to be picked up in this? This matter should be clarified in the Explanatory Memorandum.

244. A clarification: Why is the following worded differently? On what basis and to what intended effect?

Section 245APC(2)	**Section 245APD(2)**
(2) The Minister may determine a class of persons under subsection (1) only if the Minister is satisfied that making the determination is reasonably necessary to enhance the exclusive use of the prescribed computer system to confirm that non-citizens allowed to work, or referred for work, by those persons have the required permission to do that work.	(2) The Minister may declare a person to be a required system user only if the Minister is satisfied that making the declaration is reasonably necessary to help ensure that the person only uses information sourced from the prescribed computer system to confirm that non-citizens allowed to work, or referred for work, by that person have the required permission to do that work.

Does Every Australian Employer Have Access To / Know About VEVO?

245. Do most Australian employers have any knowledge that VEVO exists, or how to use it? What percentage of employing businesses are registered to access VEVO?

246. Do small and family businesses have familiarity with VEVO, know how to use it or are registered to use it? What of farmers, charities, or kindergartens run by volunteers for example?

247. What happens if someone has enduringly poor internet access, as is the case in parts of regional Australia? If the only means of satisfying oneself is online, does that create a barrier to job creation, potentially in areas of labour shortage in remote Australia?

248. There needs to be some fail safe or alternative avenue in which it's possible to a test or declare someone's status, or for the employer to be otherwise reasonably satisfied, when it is not possible to use the VEVO system.

249. We note s 245APA but question whether the reference to a particular occasion would sufficiently account for circumstances in which there was an in during an ongoing IT problem with accessing VEVO . This is not an unrealistic example, as for example a number of areas of Australia which attract tourists rely on backpacker or working holidaymaker labour and can be in very remote locations without reliable Internet access.

Commencement

250. If as we fear this is to become, or attempt to become a mandatory obligation for all employment, then as outlined above this is a massive change involving potentially many tens of thousands of work commencements per quarter, and it would be an even more massive challenge were it to commence at some point on the V shaped employment curve we saw in 2020 (in a rapid upswing of re-hiring following rapid job losses).

251. Looking at Item 21 of the Bill, there needs to be time for education, promotion, and adjustment, and there needs to be some due notice of this applying to employment after a particular date.

252. Rather than this applying to all hiring after the commencement of the Schedule, or all references of work after that date, the date of commencement should be at least six months after the passage of the bill or the commencement of the schedule, and they should be an amendment to the commencement table on page two of the Bill to allow for commencement on dates to be fixed by proclamation for various parts of the bill as may be required.

253. Such an approach would allow government to consider staggered implementation backed by information and engagement with industry and other interests.

Recommendation 13: Release VEVO statistics

Release prior to parliamentary debate on the Bill the total number of employers registered for VEVO (and as a percentage of all employers), the total number of non-citizens for whom records exist (as a percentage of all employees hired each year).

Recommendation 14: Allow time for promotion prior to commencement

Divide the commencement table in Item 2 of the Bill to allow separate proclamation for each Part of Schedule 1.

ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

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AMMA Australian Resources & Energy Group

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ARIA Australian Recording Industry Association

ARITA

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ARTA

ASMI Australian Self Medication Industry

Australian Steel Institute

ATEC Australian Tourism Export Council

ATIC Australian Tourism Industry Council

ATA Australian Trucking Association

AVA Australian Veterinary Association

BIC Bus Industry Confederation moving people

Business Council of Co-operatives and Mutuals

Caravan Industry Association of Australia

Cement Concrete & Aggregates Australia

Chemistry Australia

CAA

CMAA

Consult Australia

COPHE Council Of Private Higher Education

CPA Australia

CLIK Australasia

Customer Owned Banking Association

Direct Selling Australia

Exhibition & Event Association of Australasia

Fitness Australia

Franchisee Federation

HIA

LFRA Large Format Retail Association

Live Performance Australia

Master Builders Australia

master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

Medicines Australia

NALSPA

NDS National Disability Services

neca national electrical and communications association

nesa national employment services association

National Fire Industry Association

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