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Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

Senate Legal and Constitutional Affairs Legislation Committee

January 2022

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Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide input on the Migration Amendment (Protecting Migrant Workers) Bill 2021 (the Bill).

2. **Exposure draft process**: ACCI appreciated the earlier Exposure Draft process and the refined and improved Bill that the earlier feedback process was able to facilitate.

3. **Context and commencement**: Intake of migrants reduced significantly during the pandemic. It will be critically important as part of reopening and recovery to ensure Australia again benefits from having non-citizens able to work.

4. Feedback from ACCI's members representing smaller businesses in particular is that the immediate priority in migration policy and regulation must be addressing skills shortages and supporting businesses navigating uncertainty and in recovering from genuinely existential threats (including paucity in demand due to consumer risk aversion). There is concern from many employers that imposing new liabilities, obligations and sanctions should not be a priority in the current adverse and uncertain context.

5. These concerns should inform how the changes in the Bill are implemented if they proceed. Given the uncertainty and flux of 2022 we request scope for a staged or phased implementation of the amendments if required, to smooth their implementation and give users of the system more time to adjust to specific new obligations. The case for such flexibility appears to have increased with the growing uncertainty regarding the course of the pandemic between the introduction of the Bill and the lodgement of this submission (i.e. with Omicron).

6. The commencement arrangements in the Bill should be amended to give the Minister discretion to stagger the commencement of the changes and to work with stakeholders on implementation, promotion and information to ensure the changes can deliver the outcomes sought. This would in no way preclude simultaneous commencement from a single date, if that remains the best approach, but it would give the Minister additional flexibility if required.

Recommendation 1: Provide scope for staggered commencement

The commencement table on p 2 should be split to make it possible for each part of Schedule 1 to commence on a separate day be set by proclamation, if necessary.

7. **Labour Hire:** Various amendments address 'referring' non-citizens for work. Those representing mainstream labour hire operators and employment service providers that invest significantly in meeting workplace and migration compliance obligations may wish to provide direct input on behalf of their members directly engaged in such referrals.

8. **Promote the amendments**: The Migrant Worker Task Force (MWT) recommendations were predicated on employers being aware of increased liabilities and risks the Taskforce recommended.[1] Whilst employers maintain significant concerns regarding the MWT analysis and recommendations, it is quite correct that any changes will require employer awareness and understanding to be able to accomplish their intended purpose.

9. To achieve employer awareness, the changes in the Bill need to be supported by effective promotion and information to employers of migrant workers. There also needs to be a recognition that there has rarely been a more crowded and challenging environment for employers to be across such changes. New migration obligations will need to compete for space and understanding in running businesses in 2022 with the sheer challenges of staying in business , of sourcing skilled and competent staff, and of navigating ongoing uncertainty.

10. ACCI and its members may be able to play an important role in implementing these changes and ensuring they are 'promoted' to employers of migrant workers in this crowded and challenging environment. We are open to discussions with Government to support constructive and effective implementation of amendments after their passage.

[1] Employers do not agree that ever higher penalties will increase compliance. Criminology and sentencing theory suggests behavioural triggers are more complex than a simplistic threat and fear model of higher penalties, and also clear potential for unintended consequences.

SCH.1, PART 1 – NEW EMPLOYER SANCTIONS

Recklessness v Knowledge

11. The primary concern raised by Schedule 1, Part 1 as introduced is the fault elements for new criminal offences, and framing offences around not just knowledge but also the far less precise concept of "recklessness".

12. ACCI does not support the proposed fault element of 'recklessness' being attached to the various new criminal offences in relation to coercion, undue influence or undue pressure.[2] As set out below, there are better and more precise ways to achieve intended policy aims than adopting this inherently at-large concept.

This is not what the MWT Recommended

13. **The MWT did not recommend a test based on anything other than direct knowledge.** Recommendation 19 from the MWT was (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.

14. The MWT recommendation was clear, to create a new offence based on direct knowledge, not any wider test of recklessness. This recommendation would have been made in full knowledge that 'reckless' is currently used elsewhere in the Migration Act, and was an option the MWT could have recommended should it have chosen to do so.

15. The new criminal offences in Part 1 should be framed solely around knowledge as the sole fault element, as follows (noting also a further alternative outlined from para 28 of this submission):

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

16. 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.

17. "Clear, deliberate and systematic" are concepts indivisible from direct knowledge and intent. The MWT specifically refused to divorce criminality from knowledge and intent. That approach should shape these amendments.

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

18. 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*[3], after considerable research and analysis it framed the proposed criminal underpayment offence around 'dishonesty'. In doing so, it created an offence based on knowledge and intent, and declined to adopt a wider or looser standard extending to recklessness, which would have been at odds with what the MWT recommended, and would have attracted substantial opposition.

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

The actions targeted inherently require knowledge and intent

20. The concepts of coercion, undue influence or undue pressure[4] inherently rely on knowledge and intent. The ABCC website stresses the indivisible need for intent:

> *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.*[5]

21. 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.*[6]
>
> *There must be two elements to prove 'intent to coerce':*
>
> - *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.*[7]
>
> *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.*[8]
>
> *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.*[9]

[3] Schedule 5, Part 7,
[4] Proposed s 245AAA
[5] https://www.abcc.gov.au/your-rights-and-responsibilities/coercion
[6] Fair Work Act s.343.
[7] 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].
[8] 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].
[9] 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].

> *The prohibition applies irrespective of whether the action taken to coerce the other person is effective.*[10]
>
> *However, the actual effect of conduct may indicate the intent or purpose of the alleged contravener when the action was taken.*[11]

22. Recklessly but unknowingly coercing, pressuring or influencing someone seems illogical. 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 as reckless extortion, or reckless blackmail; coercion is inherently a wrong of knowledge and intent.

23. 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 deliberately threaten someone else into breaching the law, an action inescapably requires knowledge and intent.

The Fair Work Act 2009

24. The concepts of 'coercion', 'undue pressure' and 'undue influence' are addressed in the Fair Work Act. It is 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.

25. Undue pressure or influence is addressed in s 344 of the Fair Work Act. 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.[12]
>
> 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.[13]

[10] Explanatory Memorandum to Fair Work Bill 2008 [1391].
[11] Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd [2013] FCA 446 [228].
[12] Explanatory Memorandum to Fair Work Bill 2008 [1396].
[13] Explanatory Memorandum to Fair Work Bill 2008 [1395].

> 'Undue' conduct is conduct that is 'unwarranted; excessive; too great' or 'not proper, fitting or right; unjustified.'[14]
>
> To 'influence' is 'to move or impel to, or to do, something'.[15]
>
> The word 'pressure' refers to harassment or oppression.

26. Again, each of these concepts appears indivisible from knowledge and intent, not able to be determined by applying recklessness to the required test or element.

27. Known concepts from workplace relations law are being applied in these amendments - we see no reason to depart from their well-established execution and framing.

Wilful blindness and reckless indifference

28. We understand there is a concern that employers may be able to shield themselves from liability and potential criminal charges through artificial firewalls or deliberate ignorance.

29. If this is the case, we recommend constructing a test directed more precisely to such calculated and deliberate conduct, and not adopting the at-large concept of recklessness.

30. The following explanation for the proposed use of "recklessness" appears in the EM at paragraph 37 (emphasis added):

> *Without this provision, proof of this element to the required standard could be difficult in cases where the defendant has been wilfully blind or recklessly indifferent to the non-citizen's visa conditions.*

31. We appreciate this important clarification. If this is the intent, that wording from the EM should be applied to be more exact on any fault elements beyond direct knowledge, without any reference to recklessness.

32. Taking proposed s 245AAA(3) and melding it with para 37 of the EM, the following would be more precise and less open ended with regard to recklessness (and closer to implementing what the MWT recommended):

> *(3) For the purposes of subsection (2), the fault elements for paragraphs (1)(b) and (c) are knowledge, or wilful blindness or reckless indifference by the first person.*

Recommendation 2: Delete 'or recklessness' or be more precise

The fault elements for offences under Sch 1, Part 1 should be based on knowledge alone omitting any reference to "recklessness", or be made more precise by way of a test based on "wilful blindness or reckless indifference" omitting any reference to at-large concept of "recklessness".

[14] 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].
[15] The Macquarie Dictionary (2nd ed, 1991), 903; cited in Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 2) [2012] FMCA 459 [37].

Foreseeable breaches

33. Section 245AAA(1)(c) makes the link between coercion, undue influence or pressure, and the outcome or consequence of non-citizen either (i) breaching a work-related condition, or (ii) having been set to, or on a course to do so, but for some intervening action, even or omission.

34. Section 245AAA(1)(c)(ii) is effectively an alternate that allows an action to be brought where there has been coercion et cetera (a), the work is to be carried out by a non-citizen (b), and it would have breached to work related condition had it occurred (i.e. had the work commenced), (c)(ii). So for example an employer would not be absolved of responsibility for coercion simply because for whatever reason the employee did not end up commencing work.

35. We are concerned however at the low bar created by the words "there are reasonable grounds to believe that" in s 245AAA(1)(c)(ii); such a low bar being inappropriate for the operation of a criminal offence occasioning potential incarceration. The test should be more absolute and direct, under one of the following two options:

> (ii) ~~there are reasonable grounds to believe that,~~ if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related condition.
>
> OR
>
> (ii) ~~there are reasonable grounds to believe that,~~ it is demonstrated that if the non-citizen were to accept or agree to the arrangement, the non-citizen would have breached a work-related condition.

36. The physical element of the offence has to be more concrete and probable / causal than mere 'reasonable grounds to believe'. This seems unacceptably broad for the commission of a criminal offence. This also sees unacceptably subjective, begging the (ultimately unnecessary) questions, reasonable to whom, and what is reasonable?

37. Three very different risks may be created.

    a. The first is of criminal prosecutions against employers being brought in quite inappropriate circumstances, and any criminality being determined in an inappropriately subjective context.

    b. The second is that it may perversely become prudent for a regulator to actually allow the breaching of the work related condition even when they may be aware of it in advance (the s. 245AAA(1)(c)(i) scenario), as the s 245AAA(1)(c)(ii) scenario may not deliver sufficient certainty of prosecution. It may be great in the movies when there is surveillance of criminal activity to catch wrongdoers red-handed, but we understand the goal here is to avoid non-citizens being exposed to breaches of work related conditions.

    c. There is also the risk of new defences being created contrary to the regulatory intent.

It would seem far clearer and more practical to assess whether absent a particular intervening action a work related condition would have been breached, than to assess the subjective reasonableness of grounds and belief.

Recommendation 3: Be clearer that an offence would have occurred

Section 245AAA(1)(c)(ii) be amended to delete the subjective predicate regarding 'reasonable grounds to believe' in favour of the far clearer test of the non-citizen breaching a work-related condition but for some intervening action or omission.

SCH.1, PART 2 – PROHIBITIONS ON EMPLOYERS

38. Part 2 sets out considerable potential restrictions upon employers subject to bars or prohibitions for contravening work-related provisions.

39. ACCI appreciates significant clarifications and refinements between the original exposure draft and the Bill as introduced into Parliament.

40. Whilst not endorsing the approach recommended by the MWT, nor the new level of sanctions set out in the Bill, the execution of the policy intent is now significantly clearer and raises far fewer concerns or questions in its foreseeable operation.

41. Part 2 of Schedule 1 of the Bill as introduced appears able to be practically explained to employer users of the system by ACCI members seeking to support both migrant employment and compliance with workplace relations obligations.

42. ACCI notes with particular approval:

    a. Proposed s 245AYD(4)(d)(ii) which provides significant clarification to employers on how this would operate / which non-compliance can trigger migration sanctions.

    b. The clear construction of the table in proposed s 245AYE.

    c. The definition of a remuneration related contravention in proposed s 245AYF.

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

43. ACCI primarily focuses our feedback on Part 3 on:

    a. The importance of reasonableness to the fair, proportionate and effective execution of policy in this area / application of VEVO checking where reasonable.

    b. The flexibility that regulation making can provide to meet changing circumstances.

    c. The proposed approach to Required System Users.

44. We also address some additional matters at the end of this Section.

Ambiguity

45. There continues to be ambiguity regarding when VEVO checking obligations are triggered: in which circumstances, for which employment, for which employees. There appears to remain imprecision on how to address situations in which employers know or have reasonable confidence that a person who presents for work is not a migrant worker for example, versus how and when they need to undertake VEVO checks in other scenarios.

46. It does not seem to be the intent that VEVO checks apply to 100% of new employment, particularly given migrant workers make up only a very small percentage of the overall labour force. Given our multicultural society, it is not easy or reliable to make assumptions regarding whether someone is an Australian citizen. Determining at what point an employer should undertake a VEVO check often remains uncomfortably grey.

47. Such concerns significantly predate the current Bill and are inherent in the VEVO model, but the Bill does nothing to increase certainty, or to lessen the disquiet that VEVO obligations can create for employers / the perceived risk of incurring substantial liabilities. Many employers would have prioritised increasing the clarity and simplicity of VEVO, and its application, prior to any extended application of VEVO as proposed in the Bill.

Reasonableness

48. Item 15 of the Bill (proposed s 245AB(2)) provides a series of prescribed measures employers must take / may take to satisfy themselves that a worker is not an unlawful non-citizen.

49. ACCI strongly supports use of the 'reasonableness' concept in s 245AB(2), and in the other comparable provisions of Schedule 1, Part 3 the Bill.

50. Such an obligation on employers should at all times be a reasonable one, and it should be clear to employers how it may be satisfied. Such obligations should also be triggered only in reasonable circumstances, where it is reasonable to think that the employment of a non-citizen (lawfully able to work in Australia or not) may be a risk or prospect.

51. It should only be in a small proportion of all engagements (commencements of work in Australia) that VEVO should ever come into consideration.

Reasonable steps at reasonable times?

52. We draw attention however to the following change being wrought to the existing provisions on reasonableness:

Existing s 245AB(2)	Proposed New s 245AB(2)
(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:

53. The existing defence provided for in this provision is being changed, as is clear from the EM:

> 221. Current subsection 245AB(2) provides an exception to subsection 245AB(1) so that where a person takes reasonable steps at reasonable times to verify that the worker is not an unlawful non-citizen, the first person would not contravene current subsection 245AB(1). Accordingly, current subsection 245AB(2) provides a specific defence in relation to a contravention of subsection 245AB(1). It operates as a defence to the offence in current subsection 245AB(3), and as an exception to the related civil penalty provision in current subsection 245AB(5).
>
> 222. New subsection 245AB(2), which replaces current subsection 245AB(2), recasts the defence to focus on obtaining information from the prescribed computer system, and for the first person to be reasonably satisfied, on the basis of that information, that the worker is not an unlawful non-citizen.

54. Something important appears to be lost in this change; the existing defence is being narrowed. "Reasonable steps at reasonable times" places a critical emphasis on practicality and proportionality to circumstance.

55. In contrast, the standard in for example proposed s 245AB(2) is not a test of the reasonableness of an employer's actions. Reasonable satisfaction seems to be a label being attached to the three prescribed options to obtain visa information (VEVO) – paragraphs (2)(a), (b) and (c).

56. There would be no longer be an overarching requirement for the measures demanded to actually be reasonable, or for the times at which they would apply to be reasonable. We are concerned that this seems to be replacing a sensible, contingent and practical approach with a risk of overly strict prescription.

57. This is not a change employers can support, and we are not clear it was recommended by the Migrant Worker Taskforce.

a. We request clarification of why the existing practical approach should be discontinued.

b. We also request clarification of the intended effect and likely impact of such a change.

58. We suggest instead melding the two approaches, retaining 'reasonable steps at reasonable times', and the indication that reasonable satisfaction can be obtained on the basis of the three standard options: (a) a direct VEVO check, (b) a VEVO check from a second person, or (c) any other measures prescribed in regulations.

Recommendation 4: Retain Reasonable Steps at Reasonable Times

Amend each of the amendments in Part 3 to retain all existing references in Subdivision C of Division 12 of the Migration Act to taking "reasonable steps at reasonable times" in satisfaction of VEVO requirements.

Prescription in the Regulations

59. At various points in the amendments scope is to be created for the making of regulations on actions an employer can take to satisfy themselves that a worker is not an unlawful non-citizen (see s 245AB(2)(c), s 245AC(2)(c), s 245AE(2)(c), and s 245AEA(2)(c)).

60. The EM indicates that:

> 227. New paragraph 245AB(2)(c) establishes a regulation-making power for the Migration Regulations to prescribe other things that the first person could do in order to obtain information to be reasonably satisfied that the worker is not an unlawful non-citizen. This provision provides the flexibility to prescribe other things that may be done to obtain information on the basis of which the first person may be satisfied that a worker is not an unlawful non-citizen. This provision complements new section 245APA, which deals with circumstances in which information is unobtainable by accessing the prescribed computer system.

61. ACCI supports the Minister having such scope to clarify how employers may satisfy themselves in regard to work rights. Regulations appear an useful option to respond to any problems or ambiguities, and to stay a step ahead of technology and commercial innovations which may assist compliance in this area.

62. New technologies, particular visa classes or industry initiatives, new cooperative arrangements with other nations, or other innovations may require changes of practice that regulation making can accommodate and support rapidly and reliably.

Why Is Regulation Making Not an Additional Option Throughout?

63. However, it is not then clear why the apparently standard '(2)(a), (b) and (c)' formulation does not appear in all of the separate scenarios covered by Part 3 (or at least in more of them)?

a. (2)(a) being the direct requirement to use VEVO.

b. (2)(b) being scope for another person to login (for example the prospective worker or a contractor providing a VEVO check as part of their commercial service).

c. 2(c) being any other action / scenario prescribed in regulations.

64. Why then is the third option, the other actions prescribed by regulation, omitted from:

a. Proposed s 245AEC?

b. Proposed s 245AED?

Recommendation 5: Extend scope to make regulations throughout Part 3

Clarification be provided on why the paragraph "(c) by doing any one or more things prescribed by the regulations" which appears in s 245AB(2) is not also included in proposed s 245AEC and s 245AED, or add the option for regulation making to each of the comparable provisions in Part 3.

Required System Users

65. ACCI recognises the thinking behind requiring some users of migrant labour to use VEVO in all circumstances; the 'required system users'. Section 245APB(a) reads somewhat akin to parole or supervised release. If such a mechanism serves to allow businesses to return expeditiously to the lawful and regular employment of non-citizens, then it can be a net positive.

66. However, we are concerned at the impact of being a required system user, not only on those directly required, but on others. We read this concept as impacting not only on those directly 'required', but also on:

a. Migrant workers, who will no longer be able to present as job ready having exercised the initiative to undertake their own VEVO checks.[16]

b. Commercial providers and those whose business-to-business services include VEVO checks.[17]

67. We caution that this sanction be used sparingly, with precision and exactitude, where there is evidence of a need for such an exceptional measure, and only after consultation and feedback.

68. We have particular concerns with the declaration of classes under proposed s 245APC, and we foresee whole industries and subindustries being declared as classes under such a provision.

[16] See Example 2 in the note to proposed s 245AEC.
[17] See Example 1 in the note to proposed s 245AEC.

Declared Classes – s 245APB(b) and s 245APC.

69. Required for How Long? We read this as a specific situation in which direct use of VEVO would become mandatory on an open ended basis. This should be clarified - how long will the declaration of classes of persons who must use VEVO last for? Where in the amendments is this addressed?

Recommendation 6: Clarify the duration of class-based declarations

There be clarification of how long a declaration under s 245APB(b) / s 245APC lasts for, and how and when such declarations come to an end.

Such declarations should be time limited rather than open ended – potentially expiring / requiring review after 12 months.

70. Employers would be concerned if such declarations (which compel particular approaches and impose mandatory additional costs) were entirely open ended. If this were the case, there appears an anomaly:

    a. An employer who has been established to have done the wrong thing and has been prohibited can only then be 'required' for a further 12 months (s 245APB(a)).

    b. However, another employer who may have been entirely compliant throughout can be lumped into a class and be 'required' on an open ended basis. That seems anomalous.

71. We also query whether a specific requirement under s 245APD may under expire under s 245APD(3), but the employer then instantly becomes subject to a class based order under which they will remain required system users, apparently on an open ended basis. Does this cut across s 145APD(3)(c) and the intention that there be some temporal limitation as to how long an employer can be required for?

72. Justification / Reasons: We read s 245APD(3) as requiring a Minister to issue reasons, and to issue a declaration, and for the declaration to be appealable to the AAT. Will there similarly be reasons provided for any class based declaration under s 245APC?

73. Consultation: It is important that employers and unions be able to be heard, and have their views considered prior to declaring any industry or subindustry as a class under s 245APC. They need to be heard not only on what is actually going on in the industry and the merits of any proposed class based declaration, but also its likely costs and impacts on employers, employees and job seekers. It would not seem consistent with at least the spirit of Australia's ILO treaty obligations for such prescription to proceed without consultation with employers and trade unions.

74. As the International Labour Conference (ILC) concluded in 2018:

> Social dialogue, in all its different forms, lies at the heart of the ILO's mandate and is central to achieving fair labour migration.

> There is solid evidence that participation of the ILO's tripartite constituents in national and regional processes can strengthen the effectiveness and sustainability of labour migration policies…[18]

75. It also seems important that there be some scope for migrant workers and other interests such as educational institutions, regional councils, community groups etc to also be heard prior to a class being declared under s 245APC.

Recommendation 7: Require consultation prior to class-based declarations

Section 245APC be amended to ensure the Minister invites submissions and undertakes consultations on any draft declaration for some prescribed period before it comes into effect.

76. Appeal / Review: Under s 245APD(5) an individual subject to an individual order may seek a review from the AAT. Affected classes would seem to need the same scope for review, perhaps at the initiative of an industry association or trade union, or perhaps from a subgroup seeking to have the scope or the operation / scope of a declaration modified.

Recommendation 8: Ensure class-based declarations are reviewable by the AAT

Section 245APC be amended to provide scope for class based determinations to also be reviewable by the AAT, as is the case in proposed s 245APD(5).

77. Granularity: Any class based order needs to be as granular as possible to where problems actually exist, and to where there is evidence of problems. The ANZSIC coding framework drills down to a detailed level and may be able to provide the granularity and precision required for any class based prescription to operate fairly and proportionately.

78. For example, if there is a problem in Strawberry Growing (one part of ANZSIC Code 0133) in a particular region, this level of ANZSIC coding, or even the more detailed ones may be applied in any determination under s 245APC, along with perhaps prescribed post codes for geographical precision. It would be entirely too crude to make an order at wider ANZSIC code for all of horticulture, for example.

79. Where problems centre on sham labour hire arrangements it might be that the identification of a class excludes direct employment and targets only those claiming to offer services on a labour hire basis. Such a scenario it will be important to properly consult both representatives of the lawful and legitimate labour hire industry, and those seeking to use their services prior to the making of such a declaration.

80. Referring for Employment: Para 304 of the EM is as follows[19]:

[18] Conclusions concerning fair and effective labour migration governance (2018), at [6]
[19] Emphasis added

> 304. This provision may be used in circumstances where the Department or the ABF identify systemic issues or trends of concern in a particular industry in relation to allowing or referring non-citizens for work without the required permission. In order to address such issues, it may be considered a necessary and proportionate response to impose a general requirement for persons in that industry who are involved in allowing or referring non-citizens for work to use the prescribed system directly, and to prevent them from relying on a third-party arrangement to obtain the necessary information to confirm prospective workers have the required permission.

81. We read Para 304 of the EM as indicating that prescribing a class / industry will not preclude direct employers from being able to have non-citizens referred to them (for example through labour hire or employment service providers). This is less clear from s 245APC itself, and should be clarified.

Recommendation 9: Clarify scope for referrals

Consistent with para 30 of the EM, it should be clarified that a declaration under s 245APC does not preclude a direct employer from having persons referred to them for work, and for the referring person to undertake the required VEVO checking.

Additional Matters Raised By Part 3

Is VEVO sufficiently up to date?

82. We have some feedback from members using VEVO that the information about a particular visa holder's visa status may not always be up to date (or at least not accessible for employers and registered users in an updated form). For example, when a visa holder applies for a new visa holder status (e.g. a student/spousal visa holder applies via holding a bridging visa for a permanent residency status) often the existence of a recently granted bridging visa is not on the system.

83. Similarly, there should be a stronger obligation on visa holders to provide timely and accurate information. For example, student visa holders are anecdotally often not sufficiently forthcoming in providing confirmation of their school enrolment and timetable commitments.

84. The overall point being that any obligations or liabilities linked to VEVO must be proportionate and take due recognition of the limitations of such a system, and trigger any requirements or liabilities based only on the action of accessing the information that is available.

Alternative Sources

85. We presume that the reference to "another prescribed source" in proposed s 245AA(1)(c) is a reference to (for example):

a. An employer who does not directly log into VEVO, but has someone else do it for them (e.g. proposed s 245Ab(2)(b)).

b. Any other approach which may be prescribed in the regulations (e.g. proposed s 245Ab(2)(c)).

86. If that is not correct, it begs the question which other prescribed sources may be envisaged.

Internet and Communications Problems (s 245APA)

87. ACCI welcomes s 245APA which we read as recognising that at any point parts of the country may be isolated from access to internet or telephone services.

88. We trust that where internet access may be down or unreliable there would access to a telephone VEVO service from government (provided rapidly and free of charge), or a recognition that employees may need to be allowed to start work on a presumption that they are lawfully able to do so, subject to post-engagement VEVO verification (when internet access comes back).

89. Such problems are most common in rural, regional and remote Australia. Given agricultural and tourism work it is entirely foreseeable that some of those most likely to not have access to VEVO may be employing noncitizens and need to establish work rights as a matter of urgency.

90. Fruit and wine grapes for example need to be picked urgently and cannot wait for an alternative to VEVO to be put in place when phones or the internet goes down. Looking at proposed s 245APA(2) there certainly do need to be alternative ways to obtain information in such circumstances.

91. We invite consideration of whether there also needs to be scope for temporary or targeted Ministerial waiver of or adjustments to VEVO requirements by regulation, such as to enable employers to allow people to start work on a presumption of it being lawful and subject to later confirmation. We hope this is the intended effect clarified by paragraph 296 of the EM:

> 296. In addition to system outages, the Migration Regulations may also prescribe actions to be taken where, on occasion, information concerning the immigration stats or work-related conditions of certain visa holders is not available in the prescribed computer system. In particular, this may arise in relation to some non-citizens on certain Act-based visas, such as the absorbed person visa (taken to have been granted under section 34 of the Migration Act) or some special purpose visas (taken to have been granted under section 33 of the Migration Act).

92. By way of illustration, it should be possible for a Minister to rapidly make a declaration with the following effect:

> Given current NBN outages in wine growing regions of South Australia and the urgency of harvest, I declare under section XXX of the Migration Act that the following requirements for the use of the prescribed computer system are modified on an exceptional basis as set out below for a period of XX days commencing from DATE.

93. There would also be potential examples from tourism in remote and regional Australia, where ICT infrastructure may be impacted by cyclones, floods, tsunami etc and there is an enduring need for employment which can often only be met by non-citizens.

Recommendation 10: Provide scope to temporarily modify VEVO requirements in exceptional circumstances

The Minister be provided with discretion to relax or modify VEVO requirements on a temporary basis where there are the ICT outages / problems envisaged by s 245APA.

SCH.1, PARTS 5 & 6 – NOTICES AND UNDERTAKINGS

These can be positive alternative options for regulators

94. ACCI broadly welcomes options for undertakings and compliance notices as alternatives to sanctions and prohibitions. Employers and regulators need practical options to work together constructively through positive alternatives to sanctions, particularly the blunt and damaging sanctions of restricting further access to migrant workers, and high fines.

95. For regulators, securing voluntary compliance and agreed remediation is far quicker and less costly than litigation, and can be more positive, constructive, and encouraging of cultural change and maintaining working relationships. Alternatives to prosecution and court sanctions can also be supportive of education and improvement whilst maintaining employment for non-citizens.

Undertakings

96. We note the use of the undertakings model under the Regulatory Powers (Standard Provisions) Act 2014.

97. ACCI member feedback on undertakings with the FWO on underpayments / workplace relations non-compliance emphasises the importance of undertakings being commensurate to the contravention at hand, and at no point departing from being a genuinely efficient and cost effective alternative to litigation. Undertakings negotiated in good faith must be a genuine and appropriate (and proportionate) alternative to more punitive legal action, particularly where any breach of regulation or legislation has occurred without intent.

98. There are concerns from the employer community regarding the practicality and proportionality of undertakings being sought by some regulators, and of a regulatory tendency over time towards unreasonableness and disproportionality in the terms of undertakings. There is a genuine risk then if such tools become bureaucratised, and iterative (with the regulator adding new mandatory provisions overtime based on its experience and priorities) then their attractiveness to employers and contribution to improved compliance will fall. The analysis would need to be done, but it may well prove to be an iron law of bureaucracy that constructive, innovative tools of pragmatism, flexibility and encouragement will cease to have those qualities over time in their application by regulators.

99. This risks a lack of confidence from employers and lapsing into a situation in which undertakings cease to offer the alternative that is fundamental to their effective operation and role in compliance and enforcement. This is something to bear in mind as this potentially very important and positive, but potentially fragile and delicately calibrated, option is incorporated into migration law from the ground up via this Bill.

100. We have no further comment on Part 5 save for emphasising the need for effective coordination between the Department of Home Affairs and the FWO, as set out below.

Clear delineation from the work of the FWO

101. ACCI understands that both the Department of Home Affairs and the FWO will able to able to secure undertakings and issue compliance notices arising from the same, or related, conduct.

102. It will be important that there be effective coordination and delineation in both undertakings and compliance notices, to avoid overlap and confusion. It will be important that:

a. Migration authorities enter into undertakings and issue compliance notices solely in relation to breaches of migration law, and not in relation to workplace relations compliance.

b. The FWO exclusively enter into undertakings and issue compliance notices in relation to non-compliance with the Fair Work Act and Fair Work Instruments.

c. Employers not be asked to enter into undertakings or subject to notices with two separate regulatory bodies in relation to the same conduct.

d. Where a course of conduct breaches both migration and Fair Work obligations, and it is proposed to address this by way of undertakings or notices, there be coordination between regulators prior to any instruments being executed or proposed to employers. Employers should expect regulators to coordinate and be able to reach a single agreed approach from 'the government', without having another regulator come along seeking to add requirements to an already agreed outcome.

103. We would welcome an indication of how these practical considerations will be addressed. It would seem appropriate that an operational MOU be agreed between the FWO and Department of Home Affairs that is made available on both organisations' websites.

Identify the basis for the compliance action

104. We compared the proposed migration compliance notices under section 245ALB to s 716 of the Fair Work Act, which contains the following:

> (3) The notice must also:
>
> …
>
> (c) set out brief details of the contravention;…

105. There does not appear to be a comparable provision in s 245ALB of the Bill. An authorised officer may give a notice, and it needs to specify actions to be taken or not taken and there are references to 'conduct', but the notice does not have to specify details of the conduct which gives rise to the notice, and in particular does not appear to be required to set out which sections of the Migration Act have allegedly been breached.

106. Proposed s 245ALB should be amended to make it clear that any notice must set out the details of the contravention it is designed to address – this could be by way of an addition to s 245ALB(4), perhaps a new paragraph (d), along the lines of "set out which provisions of this Act are alleged to have been breached".

Recommendation 11: Require notices to specify provisions being contravened

Amend s 245ALB(4) to also require a compliance notice to set out the legislative provisions which have been or would be contravened.

Reasonable excuse

107. We read proposed Part 6 of Schedule 1 of the Bill against Part 5-2, Subdivision DD of the Fair Work Act which provides comparable powers to the FWO.

108. The operation of the proposed compliance notices would be assisted by including the Migration Act the equivalent of s 716(6) of the Fair Work Act, allowing scope for a reasonable excuse to be advanced where compliance with a notice is not possible.

109. A key lesson of the past two years is surely that businesses can incur entirely unforeseeable circumstances which rapidly place jobs and businesses at risk, and require rapid changes to both agreed commercial arrangements, and agreed obligations to regulators.

110. As we finalise this submission, a massive shift in the COVID-19 pandemic is creating widespread and renewed uncertainty and could carry the prospect of an employer who has agreed an arrangement with regulators in good faith and with every intent to comply, not being able to do so or being delayed in taking agreed actions.

111. The equivalent of s 716(6) of the Fair Work Act would seem a useful addition to new s 245ALB of the Migration Act.

The Bill	Fair Work Act
245ALB Compliance Notices *Person must comply with compliance notice* (5) A person who is given a compliance notice must comply with the notice. 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: 48 penalty units.	**716 Compliance Notices** (5) A person must not fail to comply with a notice given under this section. Note: This subsection is a civil remedy provision (see Part 4-1). **(6) Subsection (5) does not apply if the person has a reasonable excuse.**

Recommendation 12: Allow scope for reasonable excuses for not complying with notices

Amend s 245ALB to clarify that there may be reasonable excuses for not complying with a compliance notice, consistent with the comparable provision of the Fair Work Act (s 716(6)).

Penalties

112. The penalty for failing to comply with a compliance notice under the Migration Act would be up to 48 penalty units ($10,656).

113. The table in s 539 of the Fair Work Act sets the maximum penalty for failing to comply with a compliance notice under s 716 at 30 penalty units ($6,660).

114. We understand that the not passed Schedule 5 of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021*, would have increased the 30 penalty units in the Fair Work Act 2009 to 45, but not to the 48 in the proposed amendments to the Migration Act. The Supporting Australia's Jobs and Economic Recovery Bill contained the following:

> ***Fair Work Act 2009***
>
> **33 Subsection 539(2) (table item 33, column 4)**
>
> Omit "30 penalty units", substitute "45 penalty units".

115. ACCI recommends that:

a. Consistency be maintained between penalties under the Fair Work and Migration Acts for the same conduct, avoiding a situation in which the penalty for breaching migration markedly law exceeds that for breaching workplace laws directly.

b. It is not assumed that 30 penalty units can be replaced with the 1.5 times higher level included in amendments to the Fair Work Act that were not passed, as a new de facto standard. The 1.5 times increase was part of an overall package which was not adopted by the Senate.

c. If this is not the case, any increase be confined to 45 penalty units, avoiding a confusing additional level of 48, or that the more than $600 difference between 45 and 48 penalty units be explained.

Recommendation 13: Apply maximum penalties consistently

Limit the number of penalty units for not complying with a compliance notice issued by the Department of Home Affairs to the current level applicable to the equivalent breach under the Fair Work Act for compliance notices issued by the FWO.

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.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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Australian Regional Tourism

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Australian Retailers Association

ARTA

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ATEC Australian Tourism Export Council

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ATIC

BIA

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master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

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neca national electrical and communications association

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