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Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Migration Amendment (Strengthening
Employer Compliance) Bill 2023**

No. , 2023

(Home Affairs)

**A Bill for an Act to amend the *Migration Act 1958*,
and for related purposes**

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A Bill for an Act to amend the *Migration Act 1958*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the *Migration Amendment (Strengthening Employer Compliance) Act 2023*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1, Parts 1 to 5	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 1, Part 6, Division 1	At the same time as the provisions covered by table item 2.	
4. Schedule 1, Part 6, Division 2	The later of: (a) immediately after the commencement of the provisions covered by table item 3; and (b) immediately after the commencement of Schedule 1 to the <i>Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023</i> . However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	
Note:	This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.	

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Part 1—New employer sanctions

Migration Act 1958

1 Before paragraph 245AA(1)(a)

Insert:

- (aa) where a person coerces, or exerts undue influence or undue pressure on, a lawful non-citizen to accept or agree to a work arrangement:
 - (i) involving a breach of a work-related condition applying to a visa held by the lawful non-citizen; or
 - (ii) to avoid an adverse effect on the lawful non-citizen's status as a lawful non-citizen; or
 - (iii) to satisfy certain requirements to provide information or documents about work the lawful non-citizen has done in Australia;
- (ab) where a person coerces, or exerts undue influence or undue pressure on, an unlawful non-citizen to accept or agree to a work arrangement to avoid an adverse effect on the unlawful non-citizen's continued presence in Australia;

2 After section 245AA

Insert:

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

- (1) A person (the *first person*) contravenes this subsection if:
 - (a) the first person coerces, or exerts undue influence or undue pressure on, another person (the *worker*) to accept or agree to an arrangement in relation to work; and
 - (b) the worker is a lawful non-citizen; and
 - (c) the work is done, or is to be done, by the worker in Australia, whether for the first person or someone else; and
 - (d) the worker holds a visa that is subject to a work-related condition; and

(e) either:

- (i) the worker is in breach of the work-related condition solely because of doing the work in accordance with the arrangement; or
- (ii) the worker would be in breach of the work-related condition if the worker were to do the work in accordance with the arrangement.

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), (c), (d) and (e) 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.**

245AAB Coercing etc. an unlawful non-citizen to work—adverse effect on presence in Australia

- (1) A person (the ***first person***) contravenes this subsection if:
- (a) the first person coerces, or exerts undue influence or undue pressure on, another person (the ***worker***) to accept or agree to an arrangement in relation to work; and
 - (b) the worker is an unlawful non-citizen; and
 - (c) the arrangement provides for the work to be done by the worker in Australia, whether for the first person or someone else; and

- (d) the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement, there will be an adverse effect on the worker's continued presence in Australia.

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), (c) and (d) 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.

245AAC Coercing etc. a lawful non-citizen to work—adverse effect on status etc.

- (1) A person (the *first person*) contravenes this subsection if:
 - (a) the first person coerces, or exerts undue influence or undue pressure on, another person (the *worker*) to accept or agree to an arrangement in relation to work; and
 - (b) the worker is a lawful non-citizen (other than a holder of a permanent visa); and
 - (c) the arrangement provides for the work to be done by the worker in Australia, whether for the first person or someone else; and
 - (d) the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement:

- (i) there will be an adverse effect on the worker's status as a lawful non-citizen; or
- (ii) the worker will be unable to provide information or documents about work the worker has done in Australia that the worker is required, under this Act or the regulations, to provide in connection with a visa held by the worker or an application for a visa by the worker.

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), (c) and (d) 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**.

Part 2—Prohibited employers

Division 1—Amendments

Migration Act 1958

3 Subsection 5(1)

Insert:

relevant workplace law has the meaning given by subsection 245APA(2).

work-related offence means:

- (a) an offence against Subdivision C or E of Division 12 of Part 2; or
- (b) an offence against section 6 of the *Crimes Act 1914* that relates to an offence against one of those Subdivisions; or
- (c) an ancillary offence (within the meaning of the *Criminal Code*) that is, or relates to, an offence against one of those Subdivisions.

work-related provision means a civil penalty provision in Subdivision C, E or F of Division 12 of Part 2.

4 Paragraph 140X(aa)

Omit “or D”, substitute “, D, E or F”.

5 In the appropriate position in Division 12 of Part 2

Insert:

Subdivision E—Prohibited employers

245AYA Overview

- (1) This Subdivision provides for the Minister to declare a person to be a prohibited employer for a specified period if:
 - (a) the person is subject to a migrant worker sanction; and

- (b) no more than **5 years** have passed since the person became subject to that sanction.
- (2) Sections 245AYE to 245AYJ set out when a person is subject to a migrant worker sanction.
- (3) While a declaration is in effect, a **prohibited employer must not:**
 - (a) **allow certain additional non-citizens to begin work;** or
 - (b) have a material role in a decision made by a body corporate or other body to allow certain additional non-citizens to begin work.
- (4) After a person stops being a prohibited employer, the person must give the Department specified information about certain lawful non-citizens who the person allows to begin to work in the 12 month period after so ceasing.

245AYB Definitions

In this Subdivision:

ABN has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999*.

allows a non-citizen to begin work has the meaning given by section 245AYC.

Fair Work Ombudsman means the Fair Work Ombudsman provided for by section 681 of the *Fair Work Act 2009*.

FW order means an order under Division 2 of Part 4-1 of the *Fair Work Act 2009*.

inspector has the same meaning as in the *Fair Work Act 2009*.

involved in has the same meaning as in the *Fair Work Act 2009*.

migrant worker sanction has the meaning given by sections 245AYE to 245AYJ.

prohibited employer has the meaning given by section 245AYD.

relevant fair work provision means any of **the following provisions of the *Fair Work Act 2009*:**

- (a) section 293 (contravening a national minimum wage order);
- (b) section 305 (contravening an equal remuneration order);
- (c) subsection 323(1) or (3) (method and frequency of payment);
- (d) subsection 325(1) or (1A) (unreasonable requirements to spend or pay amount);
- (e) subsection 328(1), (2) or (3) (employer obligations in relation to guarantee of annual earnings);
- (f) section 333D (prohibition on pay secrecy terms);
- (g) section 344 (undue influence or pressure);
- (h) subsection 351(1) (discrimination);
- (i) section 352 (temporary absence because of illness or injury);
- (j) subsection 357(1) (misrepresenting employment as independent contracting arrangement);
- (k) section 358 (dismissing to engage as independent contractor);
- (l) section 359 (misrepresentation to engage as independent contractor);
- (m) section 745 (contravening the extended parental leave provisions);
- (n) section 760 (contravening the extended notice of termination provisions);
- (o) subsection 772(1) (employment not to be terminated on certain grounds);
- (p) subsection 785(4) (employer to notify Centrelink of certain proposed terminations);
- (q) a civil remedy provision (within the meaning of that Act) prescribed by the regulations.

remuneration-related matter in relation to an employee means any of the following:

- (a) the underpayment of wages, or other monetary entitlements, of the employee;
- (b) the unreasonable deduction of amounts from amounts owed to the employee;
- (c) the placing of unreasonable requirements on the employee to spend or pay amounts paid, or payable, to the employee;
- (d) the method or frequency of amounts payable to the employee in relation to the performance of work.

work means any work, whether for reward or otherwise.

245AYC Meaning of *allows a non-citizen to begin work*

- (1) A person ***allows a non-citizen to begin work*** at a particular time if, and only if:
- (a) the person employs the non-citizen by entering into a contract of service at that time; or
 - (b) the person engages the non-citizen by entering into a contract for services at that time; or
 - (c) the person begins at that time to participate in an arrangement, or any arrangement included in a series of arrangements, for the performance of work by the non-citizen for:
 - (i) the person; or
 - (ii) another participant in the arrangement or any such arrangement; or
 - (d) the person enters into a contract at that time to bail or license a chattel to the non-citizen or another person with the intention that the non-citizen will use the chattel to perform a transportation service; or
 - (e) the person enters into a contract at that time to lease or license premises, or a space within premises, to the non-citizen or another person with the intention that the non-citizen will use the premises or space to perform sexual services (within the meaning of the *Criminal Code*); or
 - (f) the prescribed circumstances exist at that time.

Note: Other parts of speech and grammatical forms of “allows a non-citizen to begin work” (for example, “the non-citizen is allowed to begin work”) have a corresponding meaning (see section 18A of the *Acts Interpretation Act 1901*).

- (2) In paragraph (1)(e):

premises means:

- (a) an area of land or any other place, whether or not it is enclosed or built on; or
- (b) a building or other structure; or
- (c) a vehicle or vessel.

245AYD Meaning of *prohibited employer*

A person is a ***prohibited employer*** at a particular time if:

- (a) a declaration in relation to the person has been made under subsection 245AYK(1); and
- (b) the declaration is in effect at that time.

245AYE When a person is subject to a migrant worker sanction—bar placed on approved work sponsor etc.

Bar placed on approved work sponsor

- (1) A person is subject to a ***migrant worker sanction*** if:
 - (a) the person is an approved work sponsor; and
 - (b) a bar is placed on the person under paragraph 140M(1)(c) or (d); and
 - (c) either:
 - (i) the person has not requested the Minister to waive the bar in accordance with any regulations made for the purposes of section 140P; or
 - (ii) if the person has made such a request—the Minister has not waived the bar under subsection 140O(2).

Failure to comply with compliance notice

- (2) A person is subject to a ***migrant worker sanction*** if:
 - (a) the person is or was an approved work sponsor; and
 - (b) a civil penalty order is made against the person in relation to a contravention of subsection 140RB(5).

245AYF When a person is subject to a migrant worker sanction—conviction of work-related offence etc.

Conviction of work-related offence

- (1) A person is subject to a ***migrant worker sanction*** if the person is convicted of a work-related offence.

Conviction of certain offences against humanity

- (2) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the person has been convicted of an offence against the following provisions of the *Criminal Code*:
 - (i) Division 270 (other than section 270.7B or section 270.8 to the extent an offence against that section relates to an offence against section 270.7B);
 - (ii) Division 271 (other than Subdivision BA); and
 - (b) the person engaged in the relevant conduct in Australia; and
 - (c) the offence related, wholly or partly, to another person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa).

Conviction of certain offences against the Fair Work Act 2009 etc.

- (3) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the person has been convicted of an offence against the *Fair Work Act 2009*, or a relevant workplace law, that is an offence of a kind prescribed by the regulations; and
 - (b) the offence related, wholly or partly, to a prescribed person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa); and
 - (c) any circumstances prescribed by the regulations apply in relation to the offence.

**245AYG When a person is subject to a migrant worker sanction—
contravention of certain civil penalty provisions etc.**

Contravention of certain civil penalty provisions of this Act

- (1) A person is subject to a **migrant worker sanction** if:
- (a) a civil penalty order is made against the person in relation to the contravention of a work-related provision; or
 - (b) all of the following apply:
 - (i) a civil penalty order is made against the person in relation to a contravention of another civil penalty provision prescribed by the regulations;

- (ii) the contravention relates, wholly or partly, to an employee of the person;
- (iii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa).

Contravention of certain provisions of relevant workplace law

- (2) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
 - (a) a court has made an order under a relevant workplace law that the person pay a pecuniary penalty for a contravention of a provision of that law; and
 - (b) the provision is prescribed by the regulations; and
 - (c) the order was not made in criminal proceedings; and
 - (d) the contravention related, wholly or partly, to a prescribed person who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
 - (e) any circumstances prescribed by the regulations apply in relation to the contravention of the provision.

**245AYH When a person is subject to a migrant worker sanction—
contravention of certain civil remedy provisions of the
Fair Work Act 2009**

Contravention of relevant fair work provision

- (1) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
 - (a) a FW order has been made against the person in relation to a contravention of a relevant fair work provision; and
 - (b) the FW order was not made on the basis that the person was a person who was involved in the contravention; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee, prospective employee or former employee of the person;
 - (ii) at the time of the contravention, the employee, prospective employee or former employee was a non-citizen (other than the holder of a permanent visa).

Contravention relating to remuneration-related matter

- (2) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) a FW order has been made against the person in relation to a contravention of any of the following provisions of the *Fair Work Act 2009*:
 - (i) section 44 (contravening the National Employment Standards);
 - (ii) section 45 (contravening a modern award);
 - (iii) section 50 (contravening an enterprise agreement);
 - (iv) section 280 (contravening a workplace determination);
 - (v) subsection 535(1), (2) or (4) (employer obligations in relation to employee records);
 - (vi) subsection 536(1), (2) or (3) (employer obligations in relation to pay slips);
 - (vii) a civil remedy provision (within the meaning of that Act) prescribed by the regulations; and
 - (b) the FW order was not made on the basis that the person was a person who was involved in the contravention; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee of the person;
 - (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
 - (d) the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee.

Contravention relating to the advertisement of rates of pay

- (3) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) both of the following apply:
 - (i) a FW order has been made against the person in relation to a contravention of subsection 536AA(1) or (2) of the *Fair Work Act 2009* (employer obligations in relation to advertising rates of pay);

- (ii) the FW order was not made on the basis that the person was a person who was involved in the contravention; or
- (b) all of the following apply:
 - (i) a FW order has been made against the person in relation to a contravention of subsection 716(5) of that Act (failure to comply with compliance notice);
 - (ii) the FW order was not made on the basis that the person was a person who was involved in the contravention;
 - (iii) the relevant compliance notice given under section 716 of that Act related to a contravention of subsection 536AA(1) or (2) of that Act (employer obligations in relation to advertising rates of pay).

Contravention relating to compliance notices

- (4) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
 - (a) a FW order has been made against the person in relation to a contravention of subsection 716(5) of the *Fair Work Act 2009* (failure to comply with compliance notice); and
 - (b) the FW order was not made on the basis that the person was a person who was involved in the contravention; and
 - (c) the relevant compliance notice given under section 716 of that Act related to a contravention of:
 - (i) a provision of the National Employment Standards (within the meaning of that Act); or
 - (ii) a term of a modern award (within the meaning of that Act); or
 - (iii) a term of an enterprise agreement (within the meaning of that Act); or
 - (iv) a term of a workplace determination (within the meaning of that Act); or
 - (v) a term of a national minimum wage order (within the meaning of that Act); or
 - (vi) a term of an equal remuneration order (within the meaning of that Act); and
 - (d) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee of the person;

- (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
- (e) in the case of a contravention of a provision or term mentioned in subparagraphs (c)(i) to (iv) of this subsection—the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee.

Other contraventions

- (5) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
 - (a) a FW order has been made against the person in relation to a contravention of a civil remedy provision (within the meaning of the *Fair Work Act 2009*); and
 - (b) the FW order was not made on the basis that the person was a person who was involved in the contravention; and
 - (c) the provision is prescribed by the regulations; and
 - (d) any circumstances prescribed by the regulations apply in relation to the contravention of the provision.
- (6) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
 - (a) a FW order has been made against the person in relation to a contravention of a civil remedy provision (within the meaning of the *Fair Work Act 2009*); and
 - (b) the FW order was made on the basis that the person was a person who was involved in the contravention; and
 - (c) the provision is prescribed by the regulations; and
 - (d) any circumstances prescribed by the regulations apply in relation to the contravention of the provision.

**245AYI When a person is subject to a migrant worker sanction—
contravention of term of enforceable undertaking etc.**

*Undertaking in relation to contravention of relevant fair work
provision*

- (1) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:

- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of a relevant fair work provision; and
 - (b) a court has made one or more orders under subsection 715(7) of that Act in relation to the undertaking; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee, prospective employee or former employee of the person;
 - (ii) at the time of the contravention, the employee, prospective employee or former employee was a non-citizen (other than the holder of a permanent visa).
- (2) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of a relevant fair work provision; and
 - (b) all of the following apply:
 - (i) the undertaking has not been withdrawn;
 - (ii) an application for an order under subsection 715(7) of that Act in relation to the undertaking has not been made;
 - (iii) a court has not made one or more orders under that subsection in relation to the undertaking; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee, prospective employee or former employee of the person;
 - (ii) at the time of the contravention, the employee, prospective employee or former employee was a non-citizen (other than the holder of a permanent visa); and
 - (d) the person has contravened a term of the undertaking.

*Undertaking in relation to contravention relating to
remuneration-related matter*

- (3) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of any of the following provisions of that Act:
 - (i) section 44 (contravening the National Employment Standards);
 - (ii) section 45 (contravening a modern award);
 - (iii) section 50 (contravening an enterprise agreement);
 - (iv) section 280 (contravening a workplace determination);
 - (v) subsection 535(1), (2) or (4) (employer obligations in relation to employee records);
 - (vi) subsection 536(1), (2) or (3) (employer obligations in relation to pay slips);
 - (vii) a civil remedy provision (within the meaning of that Act) prescribed by the regulations; and
 - (b) a court has made one or more orders under subsection 715(7) of that Act in relation to the undertaking; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee of the person;
 - (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
 - (d) in the case of a contravention of a provision mentioned in subparagraphs (a)(i) to (iv) of this subsection—the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee.
- (4) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of any of the following provisions of that Act:

- (i) section 44 (contravening the National Employment Standards);
 - (ii) section 45 (contravening a modern award);
 - (iii) section 50 (contravening an enterprise agreement);
 - (iv) section 280 (contravening a workplace determination);
 - (v) subsection 535(1), (2) or (4) (employer obligations in relation to employee records);
 - (vi) subsection 536(1), (2) or (3) (employer obligations in relation to pay slips);
 - (vii) a civil remedy provision (within the meaning of that Act) prescribed by the regulations; and
- (b) all of the following apply:
- (i) the undertaking has not been withdrawn;
 - (ii) an application for an order under subsection 715(7) of that Act in relation to the undertaking has not been made;
 - (iii) a court has not made one or more orders under that subsection in relation to the undertaking; and
- (c) both of the following apply:
- (i) the contravention related, wholly or partly, to an employee of the person;
 - (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
- (d) in the case of a contravention of a provision mentioned in subparagraphs (a)(i) to (iv) of this subsection—the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee; and
- (e) the person has contravened a term of the undertaking.

Undertaking in relation to contravention relating to advertisement of rates of pay

- (5) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of subsection 536AA(1)

- or (2) of that Act (employer obligations in relation to advertising rates of pay); and
 - (b) a court has made one or more orders under subsection 715(7) of that Act in relation to the undertaking.
- (6) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of subsection 536AA(1) or (2) of that Act (employer obligations in relation to advertising rates of pay); and
 - (b) all of the following apply:
 - (i) the undertaking has not been withdrawn;
 - (ii) an application for an order under subsection 715(7) of that Act in relation to the undertaking has not been made;
 - (iii) a court has not made one or more orders under that subsection in relation to the undertaking; and
 - (c) the person has contravened a term of the undertaking.

Other undertakings

- (7) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) the Fair Work Ombudsman has accepted an undertaking given by the person under section 715 of the *Fair Work Act 2009* in relation to a contravention of a civil remedy provision (within the meaning of that Act); and
 - (b) the provision is prescribed by the regulations; and
 - (c) any circumstances prescribed by the regulations apply in relation to the undertaking.

**245AYJ When a person is subject to a migrant worker sanction—
failure to comply with certain compliance notices**

*Compliance notice in relation to contravention relating to
remuneration-related matter*

- (1) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) an inspector has given the person a compliance notice under subsection 716(2) of the *Fair Work Act 2009* in relation to a contravention of:
 - (i) a provision of the National Employment Standards (within the meaning of that Act); or
 - (ii) a term of a modern award (within the meaning of that Act); or
 - (iii) a term of an enterprise agreement (within the meaning of that Act); or
 - (iv) a term of a workplace determination (within the meaning of that Act); or
 - (v) a term of a national minimum wage order (within the meaning of that Act); or
 - (vi) a term of an equal remuneration order (within the meaning of that Act); and
 - (b) a court has confirmed the compliance notice after reviewing it under subsection 717(1) of that Act; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee of the person;
 - (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
 - (d) in the case of a contravention of a provision or term mentioned in subparagraphs (a)(i) to (iv) of this subsection—the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee; and
 - (e) the person has failed to comply with the compliance notice and the person does not have a reasonable excuse for so failing.

- (2) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) an inspector has given the person a compliance notice under subsection 716(2) of the *Fair Work Act 2009* in relation to a contravention of:
 - (i) a provision of the National Employment Standards (within the meaning of that Act); or
 - (ii) a term of a modern award (within the meaning of that Act); or
 - (iii) a term of an enterprise agreement (within the meaning of that Act); or
 - (iv) a term of a workplace determination (within the meaning of that Act); or
 - (v) a term of a national minimum wage order (within the meaning of that Act); or
 - (vi) a term of an equal remuneration order (within the meaning of that Act); and
 - (b) all of the following apply:
 - (i) the compliance notice has not been withdrawn;
 - (ii) the person has not made an application under subsection 717(1) of that Act in relation to the compliance notice;
 - (iii) a court has not cancelled the compliance notice after reviewing it under that subsection; and
 - (c) both of the following apply:
 - (i) the contravention related, wholly or partly, to an employee of the person;
 - (ii) at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
 - (d) in the case of a contravention of a provision or term mentioned in subparagraphs (a)(i) to (iv) of this subsection—the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee; and
 - (e) the person has failed to comply with the compliance notice and the person does not have a reasonable excuse for so failing.

Compliance notice in relation to contravention relating to advertisement of rates of pay

- (3) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) an inspector has given the person a compliance notice under subsection 716(2) of the *Fair Work Act 2009* in relation to a contravention of subsection 536AA(1) or (2) of that Act (employer obligations in relation to advertising rates of pay); and
 - (b) a court has confirmed the compliance notice after reviewing it under subsection 717(1) of that Act; and
 - (c) the person has failed to comply with the compliance notice and the person does not have a reasonable excuse for so failing.
- (4) A person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- (a) an inspector has given the person a compliance notice under subsection 716(2) of the *Fair Work Act 2009* in relation to a contravention of subsection 536AA(1) or (2) of that Act (employer obligations in relation to advertising rates of pay); and
 - (b) all of the following apply:
 - (i) the compliance notice has not been withdrawn;
 - (ii) the person has not made an application under subsection 717(1) of that Act in relation to the compliance notice;
 - (iii) a court has not cancelled the compliance notice after reviewing it under that subsection; and
 - (c) the person has failed to comply with the compliance notice and the person does not have a reasonable excuse for so failing.

245AYK Declaration of person as prohibited employer

- (1) The Minister may, in writing, declare a person to be a prohibited employer if:
- (a) the person is subject to a migrant worker sanction under a particular provision of this Subdivision; and

- (b) the period of 5 years starting on the day the person became subject to a migrant worker sanction under that provision has not ended.

Note: A person may be subject to a migrant worker sanction under more than one provision of this Subdivision or subject to a migrant worker sanction multiple times under a single such provision. There is a separate 5 year period each time the person becomes subject to a migrant worker sanction.

- (2) A declaration made under subsection (1) is not a legislative instrument.

Note: A declaration made under subsection (1) can be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

Process before making declaration

- (3) Before the Minister declares a person to be a prohibited employer, the Minister must give the person a written notice:
- (a) stating that the Minister proposes to make such a declaration and the reasons for it; and
 - (b) inviting the person to make a written submission to the Minister, within the period covered by subsection (4), setting out reasons why the Minister should not make the declaration.
- (4) The period covered by this subsection is whichever of the following periods ends later:
- (a) the period ending 28 days after the day the person is given notice by the Minister under subsection (3);
 - (b) if a period is stated in that notice for the making of a written submission—the period stated.
- (5) In making a decision about whether to declare a person to be a prohibited employer, the Minister must consider:
- (a) any written submission made by the person under subsection (3) that is received by the Minister within the period covered by subsection (4); and
 - (b) any prescribed matter.

Notification and duration of declaration

- (6) If the Minister declares a person to be a prohibited employer, the Minister must, as soon as reasonably practicable, give the person a copy of the declaration.
- (7) The declaration comes into effect at the start of whichever of the following days is later:
 - (a) the day after the day the declaration is given to the person;
 - (b) the day stated in the declaration as the day the declaration comes into effect.
- (8) The declaration has effect during the period specified in the declaration (unless sooner revoked).

Review by the Administrative Appeals Tribunal

- (9) Applications may be made to the Tribunal for review of a decision under subsection (1) to declare a person to be a prohibited employer.

Note: Section 27A of the *Administrative Appeals Tribunal Act 1975* requires that people whose interests are affected by the Minister's decision be given notice of their rights to seek review of the decision.

245AYL Prohibition on allowing additional non-citizens to begin work

- (1) A person (the ***first person***) contravenes this subsection if:
 - (a) the first person is a prohibited employer at a particular time; and
 - (b) either:
 - (i) the first person allows a non-citizen to begin work at that time; or
 - (ii) the first person has a material role in a decision made by a body corporate or other body to allow a non-citizen to begin work at that time; and
 - (c) at that time, the non-citizen is either:
 - (i) an unlawful non-citizen; or
 - (ii) a lawful non-citizen (other than a holder of a permanent visa).

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 (3), the fault element for subparagraph (1)(b)(ii) is intention by the first person.

Civil penalty provision

- (4) A person who contravenes subsection (1) is liable to a civil penalty.

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.**

245AYM Publishing information about prohibited employers

- (1) If the Minister makes a declaration under subsection 245AYK(1) in relation to a person, the Minister must cause to be published on the Department's website the following information:
- (a) the name of the person;
 - (b) the person's ABN (if any);
 - (c) any other information that the Minister considers is reasonably necessary to identify the person;
 - (d) the reasons for making the declaration;
 - (e) the period for which the declaration has effect.
- (2) Subsection (1) does not apply in the prescribed circumstances.
- (3) Information published under subsection (1) must not include personal information about any individual other than the prohibited employer.
- (4) No civil liability arises from action taken by a person in good faith in publishing information under subsection (1).
- (5) To avoid doubt, the Minister is not required to arrange for the removal, from the Department's website, of information published

under subsection (1) when the person stops being a prohibited employer.

245AYN Former prohibited employers to give certain information

- (1) This section applies if:
 - (a) a person was a prohibited employer for a particular period (the *prohibition period*); and
 - (b) the person allows a non-citizen to begin work on a particular day (the *start day*) during the 12-month period starting on the day after the prohibition period ends; and
 - (c) the non-citizen is a lawful non-citizen (other than the holder of a permanent visa).
 - (2) The person must, before the end of the 28-day period starting on the start day, give the Department a written notice that:
 - (a) sets out the name of the non-citizen; and
 - (b) specifies the kind of visa held by the non-citizen; and
 - (c) specifies the work to be done by the non-citizen; and
 - (d) if the non-citizen holds a visa that is subject to one or more work-related conditions:
 - (i) sets out each of those conditions; and
 - (ii) states that the non-citizen will not be in breach of those conditions solely because of doing that work; and
 - (e) sets out any other prescribed information.
 - (3) A person is liable to a civil penalty if the person contravenes subsection (2).
- 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.
- (4) Before the Governor-General makes a regulation for the purposes of paragraph (2)(e) prescribing information that is personal information about an individual, the Minister must be satisfied that the information is reasonably necessary for monitoring compliance with Subdivisions C, E or F of this Division.

245AYO Contravening civil penalty provisions

- (1) This section applies if a civil penalty provision in this Subdivision provides that a person contravening another provision of this Subdivision (the *conduct rule provision*) is liable to a civil penalty.
- (2) For the purposes of this Act, the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.

6 Section 487A

Repeal the following definitions:

- (a) definition of *work-related offence*;
- (b) definition of *work-related provision*.

Division 2—Application provisions

7 Application—bar placed on approved work sponsor etc.

- (1) Subsection 245AYE(1) of the *Migration Act 1958*, as inserted by this Part, applies in relation to a bar placed on a person under paragraph 140M(1)(c) or (d) of that Act on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).
- (2) Subsection 245AYE(2) of the *Migration Act 1958*, as inserted by this Part, applies in relation to a civil penalty order made on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

8 Application—conviction of work-related offence etc.

Section 245AYF of the *Migration Act 1958*, as inserted by this Part, applies in relation to a conviction that occurs on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

9 Application—contravention of certain civil penalty provisions etc.

- (1) Subsection 245AYG(1) of the *Migration Act 1958*, as inserted by this Part, applies in relation to a civil penalty order made on or after the

commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

- (2) Subsection 245AYG(2) of the *Migration Act 1958*, as inserted by this Part, applies in relation to an order made under a relevant workplace law on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

10 Application—contravention of certain civil remedy provisions of the *Fair Work Act 2009*

Section 245AYH of the *Migration Act 1958*, as inserted by this Part, applies in relation to a FW order made on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

11 Application—contravention of term of enforceable undertaking etc.

Section 245AYI of the *Migration Act 1958*, as inserted by this Part, applies in relation to an undertaking accepted under section 715 of the *Fair Work Act 2009* on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

12 Application—failure to comply with certain compliance notices

Section 245AYJ of the *Migration Act 1958*, as inserted by this Part, applies in relation to a compliance notice given under subsection 716(2) of the *Fair Work Act 2009* on or after the commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

Part 3—Aligning and increasing penalties for work-related breaches

Migration Act 1958

13 Subsection 140Q(1) (penalty)

Repeal the penalty, substitute:

Civil penalty:

- (a) if the person is an approved work sponsor—240 penalty units; or
- (b) in any other case—60 penalty units.

14 Subsection 140Q(2) (penalty)

Repeal the penalty, substitute:

Civil penalty: 240 penalty units.

15 Subsection 245AB(3)

Repeal the subsection, substitute:

Offence

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Penalty: Imprisonment for 2 years or 360 penalty units, or both.

16 Subsection 245AB(5)

Repeal the subsection, substitute:

Civil penalty provision

- (5) 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.

17 Subsection **245AC(3)**

Repeal the subsection, substitute:

Offence

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Penalty: Imprisonment for 2 years or 360 penalty units, or both.

18 Subsection **245AC(5)**

Repeal the subsection, substitute:

Civil penalty provision

- (5) 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.

19 Subsections **245AD(1) and (2)** (penalty and note)

Repeal the penalty and the note, substitute:

Note: See section 245AH for when a person is being *exploited*.

Penalty: Imprisonment for 5 years or 900 penalty units, or both.

20 Subsection **245AE(3)**

Repeal the subsection, substitute:

Offence

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Penalty: Imprisonment for 2 years or 360 penalty units, or both.

21 Subsection 245AE(5)

Repeal the subsection, substitute:

Civil penalty provision

- (5) 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.

22 Subsection 245AEA(3)

Repeal the subsection, substitute:

Offence

- (3) A person commits an offence if the person contravenes subsection (1). The physical elements of the offence are set out in that subsection.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Penalty: Imprisonment for 2 years or 360 penalty units, or both.

23 Subsection 245AEA(5)

Repeal the subsection, substitute:

Civil penalty provision

- (5) A person is liable to a civil penalty if the person contravenes subsection (1).

Schedule 1 Amendments

Part 3 Aligning and increasing penalties for work-related breaches

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.

24 Subsections 245AEB(1) and (2) (penalty and note)

Repeal the penalty and the note, substitute:

Note: See section 245AH for when a person will be *exploited*.

Penalty: Imprisonment for 5 years or 900 penalty units, or both.

25 Subsection 245AK(2)

Repeal the subsection, substitute:

Civil penalty provision

- (2) An executive officer of a body corporate is liable to a civil penalty if the officer contravenes subsection (1).

Note: Section 486ZF (which provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order) does not apply in relation to this subsection.

Civil penalty: 240 penalty units.

Part 4—Enforceable undertakings for work-related breaches

Migration Act 1958

26 After section 245AL

Insert:

245ALA Enforceable undertakings

Enforceable provisions

- (1) The following provisions are enforceable under Part 6 of the Regulatory Powers Act:
 - (a) a work-related offence;
 - (b) a work-related provision.

Note: Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

Authorised person

- (2) For the purposes of Part 6 of the Regulatory Powers Act, the Minister is an authorised person in relation to the provisions mentioned in subsection (1).
- (3) The Minister may, in writing, delegate the Minister's powers and functions under Part 6 of the Regulatory Powers Act to an authorised officer in relation to the provisions mentioned in subsection (1).
- (4) The Minister may delegate a power or function under subsection (3) only if the Minister is satisfied that the authorised officer has appropriate qualifications, training or experience to exercise the power or perform the function.
- (5) An authorised officer exercising powers or performing functions under a delegation under subsection (3) must comply with any directions of the Minister.

Relevant court

- (6) For the purposes of Part 6 of the Regulatory Powers Act, an eligible court is a relevant court in relation to the provisions mentioned in subsection (1).

Enforceable undertaking may be published on the internet

- (7) An authorised person in relation to a provision mentioned in subsection (1) may publish an undertaking given in relation to the provision on the Department's website.

Extension to external Territories

- (8) Part 6 of the Regulatory Powers Act, as it applies in relation to the provisions mentioned in subsection (1), extends to a Territory to which this Act extends.

Note: See section 7 of this Act.

Relationship with civil penalty orders

- (9) The Minister must not apply for an order under subsection 486R(1) (civil penalty orders) in relation to a contravention of a work-related provision by a person if an undertaking given by the person under Part 6 of the Regulatory Powers Act in relation to the contravention has not been withdrawn.

27 Application provision

An undertaking under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014*, as that Part applies under section 245ALA of the *Migration Act 1958*, may be given in relation to conduct (including an omission) engaged in before, on or after the commencement of this item.

Part 5—Compliance notices for work-related breaches etc.

Division 1—Amendments

Migration Act 1958

28 At the end of subsection 140K(1)

Add:

; (d) an authorised officer may give the person a compliance notice under section 140RB.

29 At the end of subsection 140K(2)

Add:

; (d) an authorised officer may give the person a compliance notice under section 140RB.

30 After subsection 140RA(3)

Insert:

Relationship with compliance notices

- (3A) The authorised person in relation to the provision mentioned in subsection (1) must not accept an undertaking from a person in relation to a sponsorship obligation if that person has been given a notice under section 140RB in relation to a contravention relating to the sponsorship obligation.

31 At the end of Subdivision D of Division 3A of Part 2

Add:

140RB Compliance notices

Scope

- (1) This section applies if an authorised officer reasonably believes that a person who is or was an approved work sponsor has

contravened subsection 140Q(1) or (2) (failing to satisfy sponsorship obligations).

Giving a compliance notice

- (2) The authorised officer may give the person a notice (a **compliance notice**) specifying action that the person must, within such reasonable time as is specified in the notice, take or refrain from taking to address the contravention.

Note: The compliance notice may be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

- (3) The compliance notice may require the person to produce reasonable evidence of compliance with the notice.
- (4) The compliance notice must also:
- (a) set out the name of the person; and
 - (b) set out the name of the authorised officer; and
 - (c) set out a summary of the contravention; and
 - (d) explain that a failure to comply with the notice may contravene a civil penalty provision; and
 - (e) set out any other prescribed matters.

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.

Effect of compliance with compliance notice

- (6) A person who complies with a compliance notice is not taken by that compliance to have admitted to the contravention in relation to which the notice is given.

Relationship with enforceable undertakings

- (7) An authorised officer must not give a person a compliance notice in relation to a contravention relating to a sponsorship obligation if:

- (a) the person has given an undertaking under section 140RA in relation to that sponsorship obligation; and
- (b) the undertaking has not been withdrawn.

Relationship with civil penalty provisions

- (8) The Minister must not apply for an order under subsection 486R(1) (civil penalty orders) in relation to a contravention of subsection 140Q(1) or (2) by a person if:
 - (a) an authorised officer has given the person a compliance notice in relation to the contravention; and
 - (b) either of the following subparagraphs applies:
 - (i) the notice has not been withdrawn, and the person has complied with the notice;
 - (ii) the person has made an application to a court for judicial review of the decision to give the notice and the application has not been completely dealt with.

32 After paragraph 140X(a)

Insert:

- (aaa) for the purpose of investigating whether a person who is or was an approved work sponsor has contravened subsection 140RB(5); or

33 In the appropriate position in Division 12 of Part 2

Insert:

Subdivision F—Compliance notices for work-related breaches

245AYP Compliance notices

Scope

- (1) This section applies if an authorised officer reasonably believes that a person has contravened a conduct rule provision (within the meaning of subsection 245AL(1) or 245AYO(1)).

Giving a compliance notice

- (2) The authorised officer may give the person a notice (a **compliance notice**) specifying action that the person must, within such reasonable time as is specified in the notice, take or refrain from taking to address the contravention.

Note: The compliance notice may be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

- (3) The compliance notice may require the person to produce reasonable evidence of compliance with the notice.
- (4) The compliance notice must also:
- (a) set out the name of the person; and
 - (b) set out the name of the authorised officer; and
 - (c) set out a summary of the contravention; and
 - (d) explain that a failure to comply with the notice may contravene a civil penalty provision; and
 - (e) set out any other prescribed matters.

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.

Effect of compliance with compliance notice

- (6) A person who complies with a compliance notice is not taken by that compliance to have admitted to the contravention in relation to which the notice is given.

Relationship with enforceable undertakings

- (7) An authorised officer must not give a person a compliance notice in relation to a contravention if:
- (a) the person has given an undertaking under section 245ALA in relation to the contravention; and
 - (b) the undertaking has not been withdrawn.

Relationship with civil penalty provisions

- (8) The Minister must not apply for an order under subsection 486R(1) (civil penalty orders) in relation to a contravention of a provision mentioned in subsection (1) of this section by a person if:
- (a) an authorised officer has given the person a compliance notice in relation to the contravention; and
 - (b) either of the following subparagraphs applies:
 - (i) the notice has not been withdrawn, and the person has complied with the notice;
 - (ii) the person has made an application to a court for judicial review of the decision to give the notice and the application has not been completely dealt with.

34 Subsection 474(4) (before table item 1)

Insert:

1A	section 140RB	Compliance notices for failing to satisfy sponsorship obligations
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35 Subsection 474(4) (after table item 6)

Insert:

6A	section 245AYP	Compliance notices for work-related breaches
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Division 2—Application provision

36 Application of amendments

The amendments of the *Migration Act 1958* made by this Part apply in relation to conduct (including an omission) engaged in before, on or after the commencement of this item.

Part 6—Other amendments

Division 1—Main amendments

Migration Act 1958

37 Subsection 116(1A)

Repeal the subsection, substitute:

- (1A) The regulations may do any one or more of the following:
- (a) prescribe matters to which the Minister must, or must not, have regard in determining whether the Minister is satisfied as mentioned in:
 - (i) a paragraph of subsection (1) or (1AC); or
 - (ii) subsection (1AA) or (1AB); or
 - (b) prescribe matters to which the Minister may have regard in determining whether the Minister is satisfied as mentioned in:
 - (i) a paragraph of subsection (1) or (1AC); or
 - (ii) subsection (1AA) or (1AB); or
 - (c) specify the weight to be given to a matter prescribed under paragraph (a) or (b) of this subsection.
- (1B) Subsection (1A) does not limit the matters to which the Minister may have regard in determining whether the Minister is satisfied as mentioned in:
- (a) a paragraph of subsection (1) or (1AC); or
 - (b) subsection (1AA) or (1AB).

38 After subsection 140RA(2)

Insert:

- (2A) The Minister may, in writing, delegate the Minister's powers and functions under Part 6 of the Regulatory Powers Act to an authorised officer in relation to the provision mentioned in subsection (1).

(2B) The Minister may delegate a power or function under subsection (2A) only if the Minister is satisfied that the authorised officer has appropriate qualifications, training or experience to exercise the power or perform the function.

(2C) An authorised officer exercising powers or performing functions under a delegation under subsection (2A) must comply with any directions of the Minister.

39 Section 235

Repeal the section.

40 Subsection 245AA(4)

Repeal the subsection.

41 At the end Subdivision C of Division 12 of Part 2

Add:

245APA Effect of this Subdivision on the validity of certain contracts is to be disregarded

(1) For the purposes of a relevant workplace law, any effect of this Subdivision on the validity of a contract of service, or the validity of a contract for services, is to be disregarded.

(2) In this section:

relevant workplace law means:

- (a) another law of the Commonwealth (other than the *Fair Work Act 2009*) that regulates the relationships between the parties to a contract of service, or a contract for services, in relation to the performance of work; or
- (b) a law of a State or Territory that regulates the relationships between the parties to a contract of service, or a contract for services, in relation to the performance of work;

and includes a law dealing with occupational health and safety matters and a law dealing with workers' compensation.

Division 2—Contingent amendment

Migration Act 1958

42 At the end of subsection 245APA(2)

Add:

Note: Section 40B of the *Fair Work Act 2009* also provides that for the purposes of that Act, any effect of this Act, or an instrument made under this Act, on the validity of a contract of employment, or a contract for services, is to be disregarded.

2022–2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (STRENGTHENING EMPLOYER COMPLIANCE)
BILL 2023**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration, Citizenship and Multicultural
Affairs, the Honourable Andrew Giles MP)

MIGRATION AMENDMENT (STRENGTHENING EMPLOYER COMPLIANCE) BILL 2023

GENERAL OUTLINE

The Government is taking action to strengthen the legislative framework in the Migration Act to improve employer compliance and protect temporary migrant workers from exploitation. The proposed amendments in the Migration Amendment (Strengthening Employer Compliance) Bill 2023 seek to ensure employers do not misuse migration rules to exploit temporary migrant workers. In doing so, the amendments complement existing protections for vulnerable temporary migrant workers under Australia's workplace laws, ensuring temporary migrant workers in Australia are appropriately empowered to address unlawful conduct in the workplace. The Bill also contains provisions to improve employer compliance using both deterrence and remediation, and to protect temporary migrant workers from employers that have been found to have engaged in serious, deliberate or repeated non-compliance.

Through the amendments in this Bill, the Government is delivering on its response to two key recommendations made in the *Report of the Migrant Workers' Taskforce (March 2019)*:

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.*

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.*

The Bill amends the Migration Act to address these recommendations and strengthen the Government's response to the exploitation of temporary migrant workers in Australia by:

- establishing **new criminal offences** and associated civil penalty provisions for a person who unduly influences, unduly pressures, or coerces a non-citizen to:
 - breach a work-related condition of their visa; or
 - accept an exploitative work arrangement to meet a work-related condition of their visa;
- introducing a **new mechanism** to allow the Minister for Immigration, Citizenship and Multicultural Affairs, or an authorised delegate, **to prohibit an employer from employing any additional non-citizens for a specified period** where:
 - a court has found the employer has contravened:
 - a work-related provision under the Migration Act;
 - a provision under the Fair Work Act in relation to their treatment of a temporary migrant worker, including failure to comply with a compliance notice under subsection 716(5);
 - offences under Divisions 270 (Slavery and slavery-like practices) or 271 (Trafficking in persons) of the Criminal Code; or
 - an offence or civil penalty provision prescribed by the regulations; or

- the employer has contravened a term of an enforceable undertaking accepted under section 715, or has failed to comply with a compliance notice given under section 716 of the Fair Work Act; or
- the employer is subject to a bar under the employer sponsorship framework;
- introducing a mechanism to publish the names and relevant details of employers subjected to the proposed prohibition;
- introducing a new criminal offence (with a fault element of intention) and associated civil penalty provision for employing an additional temporary migrant worker while being subject to a prohibition, including ancillary liability under the Criminal Code and for contravention of the civil penalty provision;
- increasing and aligning the maximum criminal and civil penalties prescribed in the Migration Act in relation to current and proposed work-related and employer-sponsored related breaches;
- triggering the enforceable undertaking provisions in the Regulatory Powers Act to expand the compliance tools available for work-related offences and provisions under the Migration Act;
- providing for enforceable compliance notices where an officer suspects a contravention of a work or sponsorship related offence or related provision under the Migration Act;
- repealing section 235 of the Migration Act, which makes it a criminal offence to breach a work-related visa condition and insert an avoidance of doubt clause for remaining work-related offence provisions to resolve unintended consequences associated with breaches of work-related visa conditions that have inadvertently contributed to the abrogation of employer responsibility to provide workplace rights and entitlements; and
- introducing provisions that support amendments to the Migration Regulations to prescribe protections available to exploited temporary migrant workers.

The amendments in this Bill send a strong message to unscrupulous employers and labour hire intermediaries, and to the Australian community in general, that **the exploitation of temporary migrant workers is not acceptable.** It can cause long-term harm to temporary migrant workers. It is unfair and creates a competitive disadvantage for those employers who seek to do the right thing. It has the potential to put downward pressure on wages and conditions for Australian workers. It damages confidence in our migration system and threatens social cohesion. It also damages Australia's reputation as a preferred destination for prospective migrant workers.

This Bill also sends **a clear signal to temporary migrant workers that the Government is committed to combatting migrant worker exploitation, helping them feel more confident and secure about working in those industries where high-profile cases of exploitation have been reported.**

Addressing the problem of temporary migrant worker exploitation requires concerted, whole-of-government action. The amendments to the Migration Act contained in this Bill (if enacted) complement other measures being progressed by the Government to prevent the exploitation of temporary migrant workers, and they support the integrity of Australia's migration system.

CONSULTATION

The Department has undertaken consultation with several Commonwealth agencies in the course of developing the Bill, including the Department of the Prime Minister and Cabinet, the Department of Employment and Workplace Relations, the Attorney-General's Department, the Fair Work Ombudsman and the Office of Impact Analysis.

The Department has also engaged in targeted consultations with industry, union and civil society stakeholders to inform the proposed measures.

FINANCIAL IMPACT STATEMENT

The Government has announced \$50 million over four years to support an uplift in immigration compliance and enforcement and to support the implementation of the measures included in this Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, to the extent the Bill may limit some human rights, those limitations are reasonable, necessary and proportionate.

A statement of compatibility with human rights has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at [Attachment A](#).

COMMON ABBREVIATIONS AND ACRONYMS

Abbreviation or acronym Meaning	
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ABF	Australian Border Force
AGD Framing Guide	The Attorney-General's Department's <i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>
APP (or APPs)	The Australian Privacy Principles, under the <i>Privacy Act 1988</i>
Crimes Act	<i>Crimes Act 1914</i>
Bill	Migration Amendment (Strengthening Employer Compliance) Bill 2023
Criminal Code	Schedule 1 to the <i>Criminal Code Act 1995</i>
Department	Department of Home Affairs
Fair Work Act	<i>Fair Work Act 2009</i>
FWO	Fair Work Ombudsman
Migration Act	<i>Migration Act 1958</i>
Migration Regulations	<i>Migration Regulations 1994</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
SES	Senior Executive Service
Subdivision C	Subdivision C of Division 12 of Part 2 of the Migration Act
Taskforce	Migrant Workers' Taskforce

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. Section 1 provides that the short title of this Bill, once enacted, will be the *Migration Amendment (Strengthening Employer Compliance) Act 2023*.

Clause 2 Commencement

2. This section sets out the times at which the various sections and provisions of the Act commence.
3. Clauses 1 to 3 and anything not specifically covered below commences on the day after the Bill receives Royal Assent.
4. Parts 1 to 5 and Division 1 of Part 6 of Schedule 1 to the Bill commence the earlier of on Proclamation or the day after 12 months after Royal Assent.
5. Given the nature of the amendments made by this Bill, commencement by Proclamation is intended to provide sufficient time for the Department and the ABF to ensure the necessary systems, business processes and training are in place to support implementation of the new requirements, together with any consequential amendments of the Migration Regulations required to support these amendments.
6. This commencement provision also provides time for the Department and the ABF to engage with stakeholders, and to ensure that employers and third parties to the employment chain are aware of the new requirements, and have had the opportunity to implement any necessary changes to their business processes and practices. If a day is fixed by Proclamation, stakeholders will be provided with appropriate notice before the amendments of the Migration Act commence.
7. The commencement of Division 2 of Part 6 of Schedule 1 to the Bill is contingent on the commencement of Schedule 1 to the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*. This Division commences the later of immediately after the commencement of Division 1 of Part 6 of Schedule 1 to the Bill and the commencement of Schedule 1 to *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*. If commencement of Schedule 1 to the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* does not occur, then Division 1 of Part 6 of Schedule 1 to the Bill does not commence.

Clause 3 Schedules

8. This section provides that legislation specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned. This section also provides that any other item in a Schedule to the Act has effect according to its terms.

SCHEDULE 1 Amendments

Part 1 New employer sanctions

Migration Act 1958

Item 1 Before paragraph 245AA(1)(a)

9. This item amends current subsection 245AA(1) of the Migration Act, inserting new paragraphs 245AA(1)(aa) and 245AA(1)(ab) to refer to the new offences and civil penalty provisions to be inserted by this Part.
10. Current section 245AA provides an explanatory overview of Subdivision C. The amendments insert a summary of the new offences and civil penalty provisions for the purpose of this explanatory overview section.

Item 2 After section 245AA

11. This item inserts new sections 245AAA, 245AAB and 245AAC into the Migration Act.
12. New sections 245AAA, 245AAB and 245AAC establish new criminal offences and related civil penalty provisions that apply where a person coerces, or exerts undue influence or undue pressure on, a lawful non-citizen to accept or agree to a work arrangement in the circumstances described in new paragraph 245AA(1)(aa) and an unlawful non-citizen in the circumstances described in new paragraph 245AA(1)(ab).

New section 245AAA – Coercing etc. a lawful non-citizen to work in breach of work-related conditions

13. New section 245AAA establishes a new offence in Subdivision C.

Physical elements of the offence

14. New subsection 245AAA(1) establishes the physical elements that constitute the new offence. New subsection 245AAA(2) provides that a person commits an offence if the person contravenes new subsection 245AAA(1). The term person in new section 245AAA includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.
15. New paragraph 245AAA(1)(a) provides that the first element of the offence is that the **first person** coerces, or exerts undue influence or undue pressure on, another person (the **worker**) to accept or agree to an arrangement in relation to work.
16. New paragraph 245AAA(1)(b) provides that the second element of the offence is that the worker is a lawful non-citizen.
17. New paragraph 245AAA(1)(c) provides that the third element of the offence is that the work is done, or is to be done, by the worker in Australia, whether for the first person or someone else.

18. New paragraph 245AAA(1)(d) provides that the fourth element of the offence is that the worker holds a visa that is subject to a work-related condition.
19. New paragraph 245AAA(1)(e) provides that the fifth element of the offence is either:
 - the worker is in breach of the work-related condition solely because of doing the work in accordance with the arrangement; or
 - the worker would be in breach of the work-related condition if the worker were to do the work in accordance with the arrangement.
20. The terms ***lawful non-citizen*** and ***work-related conditions*** are each given their meaning as defined in current subsection 5(1) of the Migration Act. The term ***work*** is also relevantly defined for the purposes of Subdivision C. Current subsection 245AG(1) provides that, for the purposes of Subdivision C, ***work*** means any work, whether for reward or otherwise.

Coercion, undue influence or undue pressure

21. New section 245AAA does not define coercion, undue influence or undue pressure, instead leaving the meaning of these terms to the general law. Under the general law, undue influence or pressure is a lower threshold than coercion.
22. The purpose of criminalising coercion, undue influence and undue pressure in this offence is to target conduct that may be characterised as excessive, unfair or exploitative.

Offence

23. New subsection 245AAA(2) provides that a person commits an offence if the person contravenes new subsection 245AAA(1). This subsection also clarifies that the physical elements of the offence are set out in new subsection 245AAA(1).

Extensions of criminal responsibility

24. Current section 245AJ of the Migration Act is an offence provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAA(2). An executive officer of a body corporate commits an offence if: the body commits a work-related offence; the officer knew that, or was reckless or negligent as to whether, the work-related offence would be committed; the officer was in a position to influence the conduct of the body in relation to the work-related offence; and the officer failed to take all reasonable steps to prevent the work-related offence being committed (in light of the mandatory but not exclusive considerations in current subsection 245AJ(3)). The term ***executive officer*** is defined in current subsection 245AJ(5) for the purposes of that section. The term ***work-related offence***, which will be repealed from current section 487A and inserted as a new definition in current subsection 5(1) by this Bill, includes new subsection 245AAA(2).

25. Current subsections 245AO(1) and (2) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (2) concern the treatment of unincorporated associations, which are also relevant to new subsection 245AAA(2). An offence against Subdivision C that would otherwise be committed by a partnership or unincorporated association is taken to have been committed by each partner in the partnership, or each member of the associations committee of management, at the time the offence is committed, who: did the relevant act; or aided, abetted, counselled or procured the relevant act; or was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term ***committee of management*** is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAA(2) will appear in Subdivision C.
26. Chapter 2 of the Criminal Code (except Part 2.5) applies to all offences against the Migration Act. Current Part 2.4 of the Criminal Code sets out the rules extending criminal responsibility for the offence. For example, the effect of current section 11.1 of the Criminal Code is that criminal liability would also extend to persons who attempt to commit the offence in new subsection 245AAA(2) by attempting to contravene new subsection 245AAA(1).
27. In the case of joint commission, section 11.2A of the Criminal Code does not create an offence, but in effect extends primary criminal responsibility to all those who enter into an agreement to commit an offence against new subsection 245AAA(2).
28. Current section 6 of the Crimes Act provides that it is an offence to be an accessory after the fact, which is relevant to the offence in new subsection 245AAA(2).

Penalty

29. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to the offence in new subsection 245AAA(2).
30. Current subsection 4B(3) of the Crimes Act provides in effect that, where a body corporate is convicted of an offence against new subsection 245AAA(2) of the Migration Act, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.
31. The maximum penalty for contravening new subsection 245AAA(1) is imprisonment for two years, or 360 penalty units, or both. The maximum penalty for an offence against current subsection 245AJ(1) (concerning criminal liability of executive officers of bodies corporate) in relation to new subsection 245AAA(2) is, in effect, 360 penalty units (being a pecuniary penalty not exceeding one-fifth of the maximum pecuniary penalty that a court could impose on the body corporate for the offence).
32. The maximum penalty in Part 2.4 of the Criminal Code is, in the context of the offence in new subsection 245AAA(2):

- in the case of attempt (section 11.1), complicity and common purpose (section 11.2), commission by proxy (section 11.3), conspiracy (section 11.5)—the same as the offence in new subsection 245AAA(2); and
 - in the case of incitement (section 11.4)—imprisonment for two years, noting this may be converted into a monetary fine under current subsection 4B(2) of the Crimes Act.
33. The maximum penalty for an offence against current section 6 (*Accessory after the fact*) of the Crimes Act is imprisonment for 2 years.
 34. Combined with increases in enforcement capability, and measures to encourage increased reporting of non-compliance, the potential for a criminal penalty will act as a strong deterrent for current and future employers of non-citizens from engaging in exploitative work practices with respect to migrant workers.
 35. Migrant workers make a significant contribution to Australia's labour market and are a vital part of Australia's economy and the community. They meet skills and labour shortages, and contribute a diversity of ideas and experience. Migrant workers are also known to be particularly vulnerable to underpayment and related exploitative work practices, which can have negative long-term impacts on them and their families. The exploitation of migrant workers, if unaddressed, can also put downward pressure on the wages and conditions of Australian workers, which has the potential to cause broader damage to economic and labour market outcomes, particularly in migrant dominant sectors of the economy, and it can also cause damage to social cohesion. The issue of migrant worker exploitation is corrosive, and concerted action is required to ensure it does not become entrenched. Accordingly, it is appropriate that a person who contravenes subsection 245AAA(1) should be liable to a substantial penalty in relation to that contravention and the imposition of both criminal and civil penalties is proportionate and reasonable to act as an effective deterrent against the conduct of the kind contemplated by paragraph 425AAA(1)(a).

Fault elements

36. New subsection 245AAA(3) provides that, for the purposes of new subsection 245AAA(2), the fault element for new paragraphs 245AAA(1)(b), (c), (d) and (e) is knowledge or recklessness.
37. By expressly providing that the fault elements in relation to the physical elements in new paragraphs 245AAA(1)(b), (c) (d) and (e) of the offence are knowledge or recklessness, this operates to ensure that a person could not be wilfully ignorant of the work-related condition of the visa of a non-citizen that they allow to work, and proceed to act recklessly as to whether, as the result of an arrangement in relation to work, the non-citizen might breach the work-related condition.
38. New subsection 245AAA(3) does not specify a fault element for new paragraph 245AAA(1)(a). Accordingly, current subsection 5.6(1) of the Criminal Code provides that intention applies as the default fault element in relation to new paragraph 245AAA(1)(a).

General defences under the Criminal Code

39. The general defences in Chapter 2 of the Criminal Code apply in relation to the offence in new subsection 245AAA(2).

Civil penalty provision

40. New subsection 245AAA(4) provides that a person is liable to a civil penalty of 240 penalty units if the person contravenes new subsection 245AAA(1). The term person in new section 245AAA includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.

Extensions of civil responsibility

41. Current section 245AK of the Migration Act is a civil penalty provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAA(4). An executive officer of a body corporate contravenes current subsection 245AK(1) if: the body contravenes a civil penalty provision in Subdivision C; the officer knew that, or was reckless or negligent as to whether, the contravention would occur; the officer was in a position to influence the conduct of the body in relation to the contravention; and the officer failed to take all reasonable steps to prevent the contravention (in light of the mandatory but not exclusive considerations in current subsection 245AK(3)). The terms **executive officer**, **negligent** and **reckless** are defined in current subsection 245AK(5) for the purposes of that section. New subsection 245AAA(4) will appear in Subdivision C.
42. Current subsections 245AO(1) and (3) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (3) concern the treatment of unincorporated associations, which are relevant to the civil liability provision in new subsection 245AAA(4). A civil penalty provision in Subdivision C that would otherwise be contravened by a partnership or an unincorporated association is taken to have been contravened by each partner in the partnership, or each member of the association's committee of management, at the time of the conduct constituting the contravention, who: engaged in the conduct; or aided, abetted, counselled or procured the conduct; or was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term **committee of management** is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAA(4) will appear in Subdivision C.

43. Current section 486ZD of the Migration Act concerns ancillary contravention of a civil penalty provision, such as new subsection 245AAA(4). Current subsection 486ZD(1) provides that a person must not: attempt to contravene a civil penalty provision; or aid, abet, counsel or procure a contravention of a civil penalty provision; or induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or conspire with others to effect a contravention of a civil penalty provision. Current subsection 486ZD(1) provides in effect that a person who contravenes current subsection 486ZD(1) in relation to the civil liability provision in new subsection 245AAA(4) is taken to have contravened that provision.

State of mind

44. A note immediately below new subsection 245AAA(4) draws the reader's attention to current section 486ZF of the Migration Act. Current section 486ZF relevantly provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAA(4). The relevant exceptions to this are proceedings for a contravention of current subsection 245AK(2) (concerning civil liability of executive officers of bodies corporate) or to the extent that the proceedings relate to a contravention of subsection 486ZD(1) (concerning ancillary contravention of civil penalty provisions).
45. The intent of this note is to clarify that, for the purpose of new subsection 245AAA(4), it is sufficient to establish that a person contravened new subsection 245AAA(1). This is distinguishable from the requirement to prove the fault elements of a criminal offence, for the purpose of new subsection 245AAA(2).
46. This means that a person is liable to a civil penalty under new subsection 245AAA(4) without knowing or being reckless as to whether the non-citizen is or would be in breach of a work-related condition as a result of the arrangement.
47. Current subsection 486ZE of the Migration Act provides a mistake of fact defence to a civil penalty order in relation to a contravention of a civil penalty provision, such as new subsection 245AAA(4). A person who wishes to rely on a mistake of fact defence in proceedings for a civil penalty order bears the evidential burden in relation to that matter. Current subsection 5(1) provides that ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Civil penalty

48. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to new subsection 245AAA(4).
49. Current paragraph 486R(5)(a) of the Migration Act provides that, if the liable person is a body corporate, the pecuniary penalty for a contravention of a civil penalty provision, such as new subsection 245AAA(4), must not be more than five times the amount of the pecuniary penalty specified for the civil penalty provision.

50. Current subsection 486R(6) of the Migration Act provides that in determining the amount of the pecuniary penalty, the court must take into account all relevant matters, including the matters listed in that subsection.
51. The maximum civil penalty for contravening new subsection 245AAA(1) is 240 penalty units. The maximum civil penalty for contravening current subsection 245AK(1) of the Migration Act (concerning the civil liability of executive officers of bodies corporate) in relation to new subsection 245AAA(1) is 90 penalty units.
52. The AGD Framing Guide has been considered in relation to this provision, and the civil penalty of 240 penalty units. It is appropriate that a person who contravenes new subsection 245AAA(1) is liable to a civil penalty of this order. The civil penalty in new subsection 245AAA(4) sits alongside the offence in new subsection 245AAA(2), and reflects the serious nature and potential consequences of the conduct set out in subsection 245AAA(1). This civil penalty also aligns with the increased penalties for the current *work-related provisions*. It provides a strong and effective deterrent for current and future employers of non-citizens from engaging in exploitative work practices in relation to migrant workers and is a proportionate response to conduct of the kind contemplated by paragraph 245AAA(1)(a). It is appropriate that a person who contravenes subsection 245AAA(1) should be liable to a substantial penalty in relation to that contravention.
53. Current section 486Z of the Migration Act provides that an eligible court may not make a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAA(4), if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention. However, current section 486ZB provides that criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.
54. Current section 486ZG of the Migration Act provides that if a person is ordered to pay a pecuniary penalty for contravening a civil penalty provision, such as new subsection 245AAA(4), in respect of particular conduct, the person is not liable to a pecuniary penalty under some other provision of a law of the Commonwealth in respect of that conduct.

Conduct rule provision

55. New subsection 245AAA(4) relies on current section 245AL of the Migration Act, which applies if a civil penalty provision, such as new subsection 245AAA(4), provides that a person contravening another provision of Subdivision C (the *conduct rule provision*) is liable to a civil penalty. Current subsection 245AL(2) provides that the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.

56. For example, the effect of current subsection 245AL(2) of the Migration Act is that if a person contravenes new subsection 245AAA(1), they are taken to have contravened new subsection 245AAA(4) (the civil penalty provision), and so are liable to a civil penalty.
57. The interaction between criminal proceedings in relation to an offence and civil proceedings for a civil penalty order are described in current Division 2 of Part 8D of the Migration Act.

New section 245AAB – Coercing etc. an unlawful non-citizen to work—adverse effect on presence in Australia

58. New section 245AAB establishes a new offence under Subdivision C.

Physical elements of the offence

59. New subsection 245AAB(1) establishes the physical elements that constitute the new offence. New subsection 245AAB(2) provides that a person commits an offence if the person contravenes new subsection 245AAB(1). The term person in new section 245AAA includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.
60. New paragraph 245AAB(1)(a) provides that the first element of the offence is that a person (the **first person**) coerces, or exerts undue influence or undue pressure on, another person (the **worker**) to accept or agree to an arrangement in relation to work.
61. New paragraph 245AAB(1)(b) provides that the second element of the offence is that the worker as referred to in paragraph 245AAB(1)(a) is an unlawful non-citizen.
62. New paragraph 245AAB(1)(c) provides that the third element of the offence is that the arrangement provides for the work to be done by the worker in Australia, whether for the first person or someone else.
63. New paragraph 245AAB(1)(d) provides that the fourth element of the offence is that if the first person's conduct mentioned in paragraph 245AAB(1)(a) results in the worker believing that, if they do not accept or agree to the arrangement, there will be an adverse effect on their continued presence in Australia. In effect, this would be their detention and removal from Australia.
64. The term **unlawful non-citizen** is defined in current subsection 5(1) of the Migration Act. The term **work** is also relevantly defined for the purposes of Subdivision C. Current subsection 245AG(1) provides that, for the purposes of Subdivision C, **work** means any work, whether for reward or otherwise.

Coercion, undue influence or undue pressure

65. New section 245AAB does not define coercion, undue influence or undue pressure, instead leaving the meaning of these terms to the general law. Under the general law, undue influence or pressure is a lower threshold than coercion.

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

Offence

67. New subsection 245AAB(2) provides that a person commits an offence if the person contravenes new subsection 245AAB(1). This subsection also clarifies that the physical elements of the offence are set out in new subsection 245AAB(1).

Extensions of criminal responsibility

68. Current section 245AJ of the Migration Act is an offence provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAB(2). An executive officer of a body corporate commits an offence if: the body commits a work-related offence; the officer knew that, or was reckless or negligent as to whether, the work-related offence would be committed; the officer was in a position to influence the conduct of the body in relation to the work-related offence; and the officer failed to take all reasonable steps to prevent the work-related offence being committed (in light of the mandatory but not exclusive considerations in current subsection 245AJ(3)). The term ***executive officer*** is defined in current subsection 245AJ(5) for the purposes of that section. The term ***work-related offence***, which will be repealed from current section 487A and inserted as a new definition in current subsection 5(1) by this Bill, includes new subsection 245AAB(2).
69. Current subsections 245AO(1) and (2) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (2) concern the treatment of unincorporated associations, which are also relevant to new subsection 245AAB(2). An offence against Subdivision C that would otherwise be committed by a partnership or unincorporated association is taken to have been committed by each partner in the partnership, or each member of the associations committee of management, at the time the offence is committed, who: did the relevant act; or aided, abetted, counselled or procured the relevant act; or was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term ***committee of management*** is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAB(2) will appear in Subdivision C.
70. Chapter 2 of the Criminal Code (except Part 2.5) applies to all offences against the Migration Act. Current Part 2.4 of the Criminal Code sets out the rules extending criminal responsibility for the offence. For example, the effect of current section 11.1 of the Criminal Code is that criminal liability would also extend to persons who attempt to commit the offence in new subsection 245AAB(2) by attempting to contravene new subsection 245AAB(1).
71. In the case of joint commission, section 11.2A of the Criminal Code does not create an offence, but in effect extends primary criminal responsibility to all those who enter into an agreement to commit an offence against new subsection 245AAB(2).

72. Current section 6 of the Crimes Act provides that it is an offence to be an accessory after the fact, which is relevant to the offence in new subsection 245AAB(2).

Penalty

73. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to the offence in new subsection 245AAB(2).
74. Current subsection 4B(3) of the Crimes Act provides in effect that, where a body corporate is convicted of an offence against new subsection 245AAB(2) of the Migration Act, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.
75. The maximum penalty for contravening new subsection 245AAB(1) is imprisonment for two years, or 360 penalty units, or both. The maximum penalty for an offence against current subsection 245AJ(1) (concerning criminal liability of executive officers of bodies corporate) in relation to new subsection 245AAB(2) is, in effect, 360 penalty units (being a pecuniary penalty not exceeding one-fifth of the maximum pecuniary penalty that a court could impose on the body corporate for the offence).
76. The maximum penalty in Part 2.4 of the Criminal Code is, in the context of the offence in new subsection 245AAB(2):
- in the case of attempt (section 11.1), complicity and common purpose (section 11.2), commission by proxy (section 11.3), conspiracy (section 11.5)—the same as the offence in new subsection 245AAA(2); and
 - in the case of incitement (section 11.4)—imprisonment for two years, noting this may be converted into a monetary fine under current subsection 4B(2) of the Crimes Act.
77. The maximum penalty for an offence against current section 6 (*Accessory after the fact*) of the Crimes Act is imprisonment for 2 years.
78. The potential for a criminal penalty will act as a strong deterrent for current and future employers of non-citizens from engaging in exploitative work practices with respect to migrant workers.

79. Migrant workers make a significant contribution to Australia's labour market and are a vital part of Australia's economy and the community. They meet skills and labour shortages, and contribute a diversity of ideas and experience. Migrant workers are particularly vulnerable to underpayment and related exploitative work practices, which can have negative long-term impacts. The exploitation of migrant workers, if unaddressed, can also put downward pressure on the wages and conditions of Australian workers, which has the potential to cause broader harm to economic and labour market outcomes, particularly in migrant dominant sectors of the economy, and cause damage to our social cohesion. The issue of migrant worker exploitation is corrosive, and concerted action is required to ensure it does not become entrenched. Accordingly, it is appropriate that a person who contravenes subsection 245AAB(1) should be liable to a substantial penalty in relation to that contravention and the imposition of both criminal and civil penalties is proportionate and reasonable to act as an effective deterrent against the conduct of the kind contemplated by paragraph 245AAB(1)(a).

Fault elements

80. New subsection 245AAB(3) provides that, for the purposes of new subsection 245AAB(2), the fault element for paragraphs 245AAB(1)(b), (c) and (d) is knowledge or recklessness.
81. By expressly providing that the fault elements in relation to the physical elements in new paragraphs 245AAB(1)(b), (c) and (d) of the offence are knowledge or recklessness, this operates to ensure that a person could not be wilfully ignorant of the effect of their conduct, as prescribed at new subsection 245AAB(1)(a), on an unlawful non-citizen and to proceed to act recklessly as to whether, as the result of an arrangement in relation to work, the unlawful non-citizen entered into the arrangement in fear of an adverse effect on their continued presence in Australia.
82. New subsection 245AAB(3) does not specify a fault element for new paragraph 245AAB(1)(a). Accordingly, current subsection 5.6(1) of the Criminal Code provides that intention applies as the default fault element in relation to new paragraph 245AAB(1)(a).

General defences under the Criminal Code

83. The general defences in Chapter 2 of the Criminal Code apply in relation to the offence in new subsection 245AAB(2).

Civil penalty provision

84. New subsection 245AAB(4) provides that a person is liable to a civil penalty of 240 penalty units if the person contravenes new subsection 245AAB(1). The term person in new section 245AAB includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.

Extensions of civil responsibility

85. Current section 245AK of the Migration Act is a civil penalty provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAB(4). An executive officer of a body corporate contravenes current subsection 245AK(1) if: the body contravenes a civil penalty provision in Subdivision C; the officer knew that, or was reckless or negligent as to whether, the contravention would occur; the officer was in a position to influence the conduct of the body in relation to the contravention; and the officer failed to take all reasonable steps to prevent the contravention (in light of the mandatory but not exclusive considerations in current subsection 245AK(3)). The terms *executive officer*, *negligent* and *reckless* are defined in current subsection 245AK(5) for the purposes of that section. New subsection 245AAB(4) will appear in Subdivision C.
86. Current subsections 245AO(1) and (3) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (3) concern the treatment of unincorporated associations, which are relevant to the civil liability provision in new subsection 245AAB(4). A civil penalty provision in Subdivision C that would otherwise be contravened by a partnership or an unincorporated association is taken to have been contravened by each partner in the partnership, or each member of the association's committee of management, at the time of the conduct constituting the contravention, who: engaged in the conduct; or aided, abetted, counselled or procured the conduct; or was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term *committee of management* is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAB(4) will appear in Subdivision C.
87. Current section 486ZD of the Migration Act concerns ancillary contravention of a civil penalty provision, such as new subsection 245AAB(4). Current subsection 486ZD(1) provides that a person must not: attempt to contravene a civil penalty provision; or aid, abet, counsel or procure a contravention of a civil penalty provision; or induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or conspire with others to effect a contravention of a civil penalty provision. Current subsection 486ZD(1) provides in effect that a person who contravenes current subsection 486ZD(1) in relation to the civil liability provision in new subsection 245AAB(4) is taken to have contravened that provision.

State of mind

88. A note immediately below new subsection 245AAB(4) draws the reader's attention to current section 486ZF of the Migration Act. Current section 486ZF relevantly provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAB(4). The relevant exceptions to this are proceedings for a contravention of current subsection 245AK(2) (concerning civil liability of executive officers of bodies corporate) or to the extent that the proceedings relate to a contravention of subsection 486ZD(1) (concerning ancillary contravention of civil penalty provisions).

89. The intent of this note is to clarify that, for the purpose of new subsection 245AAB(4), it is sufficient to establish that a person contravened new subsection 245AAB(1). This is distinguishable from the requirement to prove the fault elements of a criminal offence, for the purpose of new subsection 245AAB(2).
90. This means that a person is liable to a civil penalty under new subsection 245AAB(4) without knowing or being reckless as to whether the non-citizen is or would be in breach of a work-related condition as a result of the arrangement.
91. Current subsection 486ZE of the Migration Act provides a mistake of fact defence to a civil penalty order in relation to a contravention of a civil penalty provision, such as new subsection 245AAB(4). A person who wishes to rely on a mistake of fact defence in proceedings for a civil penalty order bears the evidential burden in relation to that matter. Current subsection 5(1) provides that ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Civil penalty

92. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to new subsection 245AAB(4).
93. Current paragraph 486R(5)(a) of the Migration Act provides that, if the liable person is a body corporate, the pecuniary penalty for a contravention of a civil penalty provision, such as new subsection 245AAB(4), must not be more than five times the amount of the pecuniary penalty specified for the civil penalty provision.
94. Current subsection 486R(6) of the Migration Act provides that in determining the amount of the pecuniary penalty, the court must take into account all relevant matters, including the matters listed in that subsection.
95. The maximum civil penalty for contravening new subsection 245AAB(1) is 240 penalty units. The maximum civil penalty for contravening current subsection 245AK(1) of the Migration Act (concerning the civil liability of executive officers of bodies corporate) in relation to new subsection 245AAB(1) is 90 penalty units.
96. The AGD Framing Guide has been considered in relation to this provision, and the civil penalty of 240 penalty units. It is appropriate that a person who contravenes new subsection 245AAB(1) is liable to a civil penalty of this order. The civil penalty in new subsection 245AAB(4) sits alongside the offence in new subsection 245AAB(2), and reflects the serious nature and potential consequences of the conduct set out in subsection 245AAB(1). This civil penalty also aligns with the increased penalties for the current ***work-related provisions***. It provides a strong and effective deterrent for current and future employers of non-citizens from engaging in exploitative work practices in relation to migrant workers and is a proportionate response to conduct of the kind contemplated by paragraph 245AAB(1)(a). It is appropriate that a person who contravenes subsection 245AAB(1) should be liable to a substantial penalty in relation to that contravention.

97. Current section 486Z of the Migration Act provides that an eligible court may not make a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAB(4), if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention. However, current section 486ZB provides that criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.
98. Current section 486ZG of the Migration Act provides that if a person is ordered to pay a pecuniary penalty for contravening a civil penalty provision, such as new subsection 245AAB(4), in respect of particular conduct, the person is not liable to a pecuniary penalty under some other provision of a law of the Commonwealth in respect of that conduct.

Conduct rule provision

99. New subsection 245AAB(4) relies on current section 245AL of the Migration Act, which applies if a civil penalty provision, such as new subsection 245AAB(4), provides that a person contravening another provision of Subdivision C (the **conduct rule provision**) is liable to a civil penalty. Current subsection 245AL(2) provides that the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.
100. For example, the effect of current subsection 245AL(2) of the Migration Act is that if a person contravenes new subsection 245AAB(1), they are taken to have contravened new subsection 245AAB(4) (the civil penalty provision), and so are liable to a civil penalty.
101. The interaction between criminal proceedings in relation to an offence and civil proceedings for a civil penalty order are described in current Division 2 of Part 8D of the Migration Act.

New section 245AAC – Coercing etc. a lawful non-citizen to work—adverse effect on status etc.

102. New section 245AAC establishes a new offence in Subdivision C.

Physical elements of the offence

103. New subsection 245AAC(1) establishes the physical elements that constitute the new offence. New subsection 245AAC(2) provides that a person commits an offence if the person contravenes new subsection 245AAC(1). The term person in new section 245AAC includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.
104. New paragraph 245AAC(1)(a) provides that the first element of the offence is that a person (the **first person**) coerces, or exerts undue influence or undue pressure on, another person (the **worker**) to accept or agree to an arrangement in relation to work.

105. New paragraph 245AAC(1)(b) provides that the second element of the offence is that the worker referred to in paragraph 245AAC(1)(a) is a lawful non-citizen, other than a permanent visa holder.
106. New paragraph 245AAC(1)(c) provides that the third element of the offence provides for the work to be done by the worker in Australia, whether for the first person or someone else.
107. New paragraph 245AAC(1)(d) provides that the fourth element is that if the first person's conduct mentioned in paragraph 245AAC(1)(a) results in the worker believing that, if they do not accept or agree to the arrangement, there will be, either:
- an adverse effect on the worker's status as a lawful non-citizen (such as visa cancellation); or
 - the worker will be unable to provide information or documents about work the worker has done in Australia that the worker is required, under the Migration Act or the regulations, to provide in connection with a visa held by the worker or an application for a visa by the worker (for example, they would not be able to meet the requirements to support a visa application).
108. The term ***lawful non-citizen*** is defined in current subsection 5(1) of the Migration Act. The term ***work*** is also relevantly defined for the purposes of Subdivision C. Current subsection 245AG(1) provides that, for the purposes of Subdivision C, ***work*** means any work, whether for reward or otherwise.

Coercion, undue influence or undue pressure

109. New section 245AAC does not define coercion, undue influence or undue pressure, instead leaving the meaning of these terms to the general law. Under the general law, undue influence or pressure is a lower threshold than coercion.
110. The purpose of criminalising coercion, undue influence and undue pressure in this offence is to target conduct that may be characterised as excessive, unfair or exploitative.

Offence

111. New subsection 245AAC(2) provides that a person commits an offence if the person contravenes new subsection 245AAC(1). This subsection also clarifies that the physical elements of the offence are set out in new subsection 245AAC(1).

Extensions of criminal responsibility

112. Current section 245AJ of the Migration Act is an offence provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAC(2). An executive officer of a body corporate commits an offence if: the body commits a work-related offence; the officer knew that, or was reckless or negligent as to whether, the work-related offence would be committed; the officer was in a position to influence the conduct of the body in relation to the work-related offence; and the officer failed to take all reasonable steps to prevent the work-related offence being committed (in light of the mandatory but not exclusive considerations in current subsection 245AJ(3)). The term ***executive officer*** is defined in current subsection 245AJ(5) for the purposes of that section. The term ***work-related offence***, which will be repealed from current section 487A and inserted as a new definition in current subsection 5(1) by this Bill, includes new subsection 245AAC(2).
113. Current subsections 245AO(1) and (2) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (2) concern the treatment of unincorporated associations, which are also relevant to new subsection 245AAC(2). An offence against Subdivision C that would otherwise be committed by a partnership or unincorporated association is taken to have been committed by each partner in the partnership, or each member of the associations committee of management, at the time the offence is committed, who: did the relevant act; or aided, abetted, counselled or procured the relevant act; or was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term ***committee of management*** is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAC(2) will appear in Subdivision C.
114. Chapter 2 of the Criminal Code (except Part 2.5) applies to all offences against the Migration Act. Current Part 2.4 of the Criminal Code sets out the rules extending criminal responsibility for the offence. For example, the effect of current section 11.1 of the Criminal Code is that criminal liability would also extend to persons who attempt to commit the offence in new subsection 245AAC(2) by attempting to contravene new subsection 245AAC(1).
115. In the case of joint commission, section 11.2A of the Criminal Code does not create an offence, but in effect extends primary criminal responsibility to all those who enter into an agreement to commit an offence against new subsection 245AAC(2).
116. Current section 6 of the Crimes Act provides that it is an offence to be an accessory after the fact, which is relevant to the offence in new subsection 245AAC(2).

Penalty

117. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to the offence in new subsection 245AAC(2).

118. Current subsection 4B(3) of the Crimes Act provides in effect that, where a body corporate is convicted of an offence against new subsection 245AAC(2) of the Migration Act, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.
119. The maximum penalty for contravening new subsection 245AAC(1) is imprisonment for two years, or 360 penalty units, or both. The maximum penalty for an offence against current subsection 245AJ(1) (concerning criminal liability of executive officers of bodies corporate) in relation to new subsection 245AAC(2) is, in effect, 360 penalty units (being a pecuniary penalty not exceeding one-fifth of the maximum pecuniary penalty that a court could impose on the body corporate for the offence).
120. The maximum penalty in Part 2.4 of the Criminal Code is, in the context of the offence in new subsection 245AAC(2):
- in the case of attempt (section 11.1), complicity and common purpose (section 11.2), commission by proxy (section 11.3), conspiracy (section 11.5)—the same as the offence in new subsection 245AAC(2); and
 - in the case of incitement (section 11.4)—imprisonment for two years, noting this may be converted into a monetary fine under current subsection 4B(2) of the Crimes Act.
121. The maximum penalty for an offence against current section 6 (*Accessory after the fact*) of the Crimes Act is imprisonment for 2 years.
122. The potential for a criminal penalty will act as a strong deterrent for current and future employers of non-citizens from engaging in exploitative work practices with respect to migrant workers.
123. Migrant workers make a significant contribution to Australia's labour market and are a vital part of Australia's economy and the community. They meet skills and labour shortages, and contribute a diversity of ideas and experience. Migrant workers are particularly vulnerable to underpayment and related exploitative work practices, which can have negative impacts. The exploitation of migrant workers, if unaddressed, can also put downward pressure on the wages and conditions of Australian workers, which has the potential to cause broader harm to economic and labour market outcomes, particularly in migrant dominant sectors of the economy, and cause damage to our social cohesion. The issue of migrant worker exploitation is corrosive, and concerted action is required to ensure it does not become entrenched. Accordingly, it is appropriate that a person who contravenes subsection 245AAC(1) should be liable to a substantial penalty in relation to that contravention and the imposition of both criminal and civil penalties is proportionate and reasonable to act as an effective deterrent against the conduct of the kind contemplated by paragraph 245AAC(1)(a).

Fault elements

124. New subsection 245AAC(3) provides that, for the purposes of new subsection 245AAC(2), the fault element for paragraphs 245AAC(1)(b), (c) and (d) is knowledge or recklessness by the first person.
125. By expressly providing that the fault elements in relation to the physical elements in new paragraphs 245AAC(1)(b), (c) and (d) of the offence are knowledge or recklessness, this operates to ensure that a person could not be wilfully blind or reckless as to the worker's immigration status or in relation to any obligations on the worker to provide information or documentation about the work they have done in Australia in order to satisfy requirements under Migration legislation in relation to their current visa or an application for a future visa.
126. New subsection 245AAC(3) does not specify a fault element for new paragraph 245AAC(1)(a). Accordingly, current subsection 5.6(1) of the Criminal Code provides that intention applies as the default fault element in relation to new paragraph 245AAC(1)(a).

General defences under the Criminal Code

127. The general defences in Chapter 2 of the Criminal Code apply in relation to the offence in new subsection 245AAC(2).

Civil penalty provision

128. New subsection 245AAC(4) provides that a person is liable to a civil penalty of 240 penalty units if the person contravenes new subsection 245AAC(1). The term person in new section 245AAC includes an individual, a body corporate and a body politic, pursuant to current section 2C of the Acts Interpretations Act.

Extensions of civil responsibility

129. Current section 245AK of the Migration Act is a civil penalty provision concerning executive officers of bodies corporate, which is relevant to new subsection 245AAC(4). An executive officer of a body corporate contravenes current subsection 245AK(1) if: the body contravenes a civil penalty provision in Subdivision C; the officer knew that, or was reckless or negligent as to whether, the contravention would occur; the officer was in a position to influence the conduct of the body in relation to the contravention; and the officer failed to take all reasonable steps to prevent the contravention (in light of the mandatory but not exclusive considerations in current subsection 245AK(3)). The terms ***executive officer***, ***negligent*** and ***reckless*** are defined in current subsection 245AK(5) for the purposes of that section. New subsection 245AAC(4) will appear in Subdivision C.

130. Current subsections 245AO(1) and (3) of the Migration Act concern the treatment of partnerships, and current subsections 245AP(1) and (3) concern the treatment of unincorporated associations, which are relevant to the civil liability provision in new subsection 245AAC(4). A civil penalty provision in Subdivision C that would otherwise be contravened by a partnership or an unincorporated association is taken to have been contravened by each partner in the partnership, or each member of the association's committee of management, at the time of the conduct constituting the contravention, who: engaged in the conduct; or aided, abetted, counselled or procured the conduct; or was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner or member, as the case may be). The term ***committee of management*** is defined in current subsection 5(1) to mean a body (however described) that governs, manages or conducts the affairs of the association. New subsection 245AAC(4) will appear in Subdivision C.
131. Current section 486ZD of the Migration Act concerns ancillary contravention of a civil penalty provision, such as new subsection 245AAC(4). Current subsection 486ZD(1) provides that a person must not: attempt to contravene a civil penalty provision; or aid, abet, counsel or procure a contravention of a civil penalty provision; or induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or conspire with others to effect a contravention of a civil penalty provision. Current subsection 486ZD(1) provides in effect that a person who contravenes current subsection 486ZD(1) in relation to the civil liability provision in new subsection 245AAC(4) is taken to have contravened that provision.

State of mind

132. A note immediately below new subsection 245AAC(4) draws the reader's attention to current section 486ZF of the Migration Act. Current section 486ZF relevantly provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAC(4). The relevant exceptions to this are proceedings for a contravention of current subsection 245AK(2) (concerning civil liability of executive officers of bodies corporate) or to the extent that the proceedings relate to a contravention of subsection 486ZD(1) (concerning ancillary contravention of civil penalty provisions).
133. The intent of this note is to clarify that, for the purpose of new subsection 245AAC(4), it is sufficient to establish that a person contravened new subsection 245AAC(1). This is distinguishable from the requirement to prove the fault elements of a criminal offence, for the purpose of new subsection 245AAC(2).
134. This means that a person is liable to a civil penalty under new subsection 245AAC(4) without knowing or being reckless as to whether the non-citizen is or would be in breach of a work-related condition as a result of the arrangement.

135. Current subsection 486ZE of the Migration Act provides a mistake of fact defence to a civil penalty order in relation to a contravention of a civil penalty provision, such as new subsection 245AAC(4). A person who wishes to rely on a mistake of fact defence in proceedings for a civil penalty order bears the evidential burden in relation to that matter. Current subsection 5(1) provides that ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Civil penalty

136. Current subsection 4AA(1) of the Crimes Act provides the meaning of penalty units in relation to new subsection 245AAC(4).
137. Current paragraph 486R(5)(a) of the Migration Act provides that, if the liable person is a body corporate, the pecuniary penalty for a contravention of a civil penalty provision, such as new subsection 245AAC(4), must not be more than five times the amount of the pecuniary penalty specified for the civil penalty provision.
138. Current subsection 486R(6) of the Migration Act provides that in determining the amount of the pecuniary penalty, the court must take into account all relevant matters, including the matters listed in that subsection.
139. The maximum civil penalty for contravening new subsection 245AAC(1) is 240 penalty units. The maximum civil penalty for contravening current subsection 245AK(1) of the Migration Act (concerning the civil liability of executive officers of bodies corporate) in relation to new subsection 245AAC(1) is 90 penalty units.
140. The AGD Framing Guide has been considered in relation to this provision, and the civil penalty of 240 penalty units. It is appropriate that a person who contravenes new subsection 245AAC(1) is liable to a civil penalty of this order. The civil penalty in new subsection 245AAC(4) sits alongside the offence in new subsection 245AAC(2), and reflects the serious nature and potential consequences of the conduct set out in subsection 245AAC(1). This civil penalty also aligns with the increased penalties for the current ***work-related provisions***. It provides a strong and effective deterrent for current and future employers of non-citizens from engaging in exploitative work practices in relation to migrant workers and is a proportionate response to conduct of the kind contemplated by paragraph 245AAC(1)(a). It is appropriate that a person who contravenes subsection 245AAC(1) should be liable to a substantial penalty in relation to that contravention.
141. Current section 486Z of the Migration Act provides that an eligible court may not make a civil penalty order against a person for a contravention of a civil penalty provision, such as new subsection 245AAC(4), if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention. However, current section 486ZB provides that criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.

142. Current section 486ZG of the Migration Act provides that if a person is ordered to pay a pecuniary penalty for contravening a civil penalty provision, such as new subsection 245AAC(4), in respect of particular conduct, the person is not liable to a pecuniary penalty under some other provision of a law of the Commonwealth in respect of that conduct.

Conduct rule provision

143. New subsection 245AAC(4) relies on current section 245AL of the Migration Act, which applies if a civil penalty provision, such as new subsection 245AAC(4), provides that a person contravening another provision of Subdivision C (the **conduct rule provision**) is liable to a civil penalty. Current subsection 245AL(2) provides that the person is taken to contravene the civil penalty provision if the person contravenes the conduct rule provision.
144. For example, the effect of current subsection 245AL(2) of the Migration Act is that if a person contravenes new subsection 245AAC(1), they are taken to have contravened new subsection 245AAC(4) (the civil penalty provision), and so are liable to a civil penalty.
145. The interaction between criminal proceedings in relation to an offence and civil proceedings for a civil penalty order are described in current Division 2 of Part 8D of the Migration Act.

Part 2 Prohibited employers

Division 1 Amendments

Migration Act 1958

Item 3 Subsection 5(1)

146. This item amends current subsection 5(1) of the Migration Act to insert new defined terms.
147. The new defined term ***relevant workplace law*** has the meaning given by new subsection 245APA(2).
148. The new defined term ***work-related offence*** means:
- an offence against Subdivision C or E of Division 12 of Part 2 of the Migration Act; or
 - an offence against section 6 of the Crimes Act that relates to an offence against Subdivision C or E; or
 - an ancillary offence (within the meaning of the Criminal Code) that is, or relates to, an offence against Subdivision C or E.
149. The new defined term ***work-related provision*** means a civil penalty provision in Subdivision C, E or F of Division 12 of Part 2 of the Migration Act.
150. Currently, the terms ***work-related offence*** and ***work-related provision*** are defined in section 487A of the Migration Act for the purposes of Part 8E only. Part 8E deals with investigation powers relating to certain offences and provisions, including ***work-related offences*** and ***work-related provisions***.
151. This amendment moves these definitions from current section 487A to current subsection 5(1), ensuring the terms have a consistent meaning across the Migration Act.

Item 4 Paragraph 140X(aa)

152. This item amends current paragraph 140X(aa), inserting a consequential reference to new Subdivisions E and F of Division 12 of Part 2 of the Migration Act. This amendment ensures that the powers of an inspector under Subdivision F of Division 3A of Part 2 of the Migration Act may be exercised for the purposes of investigating whether a person who is or was an approved work sponsor has committed an offence, or contravened a civil penalty provision, under new Subdivisions E and F of Division 12 of Part 2 of the Migration Act.
153. This consequential amendment is necessary because a person subject to a bar under current paragraph 140M(1)(c) or (d) in Subdivision D of Division 3A may also be a ***prohibited employer*** under new Subdivision E of Division 12 or subject to a compliance notice under new Subdivision F of Division 12.

Item 5 In the appropriate position in Division 12 of Part 2

154. This item inserts a new Subdivision E at the end of Division 12 of Part 2 of the Migration Act. The amendments operate collectively to establish a new framework to prohibit certain persons from allowing certain additional non-citizens to begin work for a specified period with associated offence and civil penalty provisions for non-compliance, and to provide reporting obligations with associated civil penalty provisions for non-compliance.

Overview

155. New section 245AYA provides an overview and simplified outline of new Subdivision E of Division 12 of Part 2 of the Migration Act.
156. New subsection 245AYA(1) outlines the circumstances in which certain persons (called ***prohibited employers***) may be prohibited by the Minister from allowing additional non-citizens to begin work.
157. New subsection 245AYA(2) sets out the provisions that provide for when a person can be subject to a ***migrant worker sanction***, which enlivens the Minister's power to make a prohibition declaration.
158. New subsection 245AYA(3) summarises the conduct that is prohibited when a prohibition declaration is in effect.
159. New subsection 245AYA(4) summarises reporting obligations for a person who ceases to be a prohibited employer.

Definitions

160. New section 245AYB inserts the following definitions for the purpose of new Subdivision E:
- ***ABN*** has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999*;
 - ***allows a non-citizen to begin work*** has the meaning given by new section 245AYC;
 - ***Fair Work Ombudsman*** means the Fair Work Ombudsman provided for by current section 681 of the Fair Work Act;
 - ***FW order*** means an order under current Division 2 of Part 4-1 of the Fair Work Act (which relate to orders for civil remedies);
 - ***inspector*** has the same meaning as in the Fair Work Act;
 - ***involved in*** has the same meaning as in the Fair Work Act.
 - ***migrant worker sanction*** has the meaning given by new sections 245AYE to 245AYJ;

- ***prohibited employer*** has the meaning given by new section 245AYD;
 - ***relevant fair work provision*** is defined to include specified provisions of the Fair Work Act and a civil remedy provision (within the meaning of the Fair Work Act) prescribed by the regulations;
 - ***remuneration-related matter*** in relation to an employee means any one of the following: the underpayment of wages, or other monetary entitlements, of the employee; the unreasonable deduction of amounts from amounts owed to the employee; the placing of unreasonable requirements on the employee to spend or pay amounts paid, or payable, to the employee; the method or frequency of amounts payable to the employee in relation to the performance of work; and
 - ***work*** means any work, whether for reward or otherwise.
161. The definition of ***work*** is intended to be a broad definition and may include, for example, paid work, voluntary work or work done in return for accommodation, food or any other benefit. A broad definition is also needed to capture situations where persons may work in conditions of sexual servitude without receiving any remuneration.
162. Work is also defined in this way to ensure consistency with current subsection 245AG(1) of the Migration Act, which defines ***work*** for the purposes of current Subdivision C of Division 12 of Part 2 of the Migration Act. This approach also reflects the close relationship between current Subdivision C, which contains work-related offences and work-related provisions, and new Subdivision E.

Meaning of allows a non-citizen to begin work

163. New section 245AYC sets out the exhaustive list of circumstances in which a person ***allows a non-citizen to begin work*** at a particular time.
164. The circumstances are sufficiently broad to cover the traditional employer-employee relationships, as well as alternative working arrangements, including where workers are made available for ad hoc work by an intermediary in return for payment to that intermediary, or arrangements in other industries in which non-citizens may be vulnerable, such as in the construction, taxi, hospitality, cleaning and sex industries.
165. New paragraph 245AYC(1)(a) provides that a person ***allows a non-citizen to begin work*** at a particular time if the person employs the non-citizen by entering into a contract of service at that time. Consistent with the intention of the comparable provision in current paragraph 245AG(2)(a) of the Migration Act, a person employs another person under a contract of service if they are in an employer-employee relationship.
166. New paragraph 245AYC(1)(b) provides that a person ***allows a non-citizen to begin work*** at a particular time if the person engages the non-citizen by entering into a contract for services at that time. Consistent with the intention of the comparable provision in current paragraph 245AG(2)(b) of the Migration Act, a person engages another person under a contract for services if the other person is an independent contractor.

167. New paragraph 245AYC(1)(c) provides that a person ***allows a non-citizen to begin work*** at a particular time if the person begins at that time to participate in an arrangement, or any arrangement included in a series of arrangements, for the performance of work by the non-citizen for: the first person; or another participant in the arrangement or any such arrangement.
168. Consistent with the comparable provision in current paragraph 245AG(2)(ba) of the Migration Act, this provision ensures that a person who participates in a chain of events which results in a contravention of the work-related offences or work-related provisions can be held liable for committing that work-related offence or contravening that work-related provision.
169. New paragraph 245AYC(1)(d) provides that a person ***allows a non-citizen to begin work*** at a particular time if the person enters into a contract at that time to bail or license a chattel to the non-citizen or another person with the intention that the non-citizen will use the chattel to perform a transportation service.
170. This paragraph is intentionally limited to transportation services. The amendments are intended to only affect, for example, taxi companies and other chauffeured car hire services. It is not intended to apply to car rental agencies.
171. An example of a situation of allowing a non-citizen to work is where an owner of a taxi bails or licenses their taxi to a non-citizen driver for agreed periods, on agreed terms and conditions. The owner and the driver are not in an employment relationship, but the owner clearly intends the driver to work and payment for the use of the taxi may be calculated as a proportion of the driver's fares.
172. New paragraph 245AYC(1)(d) also allows for the situation in which the owner of a taxi bails or licenses a taxi to a person who is not the non-citizen driver. In these circumstances, if the owner intends that the driver will drive the taxi, the owner will allow the driver to begin work, despite the fact that the contractual relationship is between the owner and another person.
173. New paragraph 245AYC(1)(e) provides that a person ***allows a non-citizen to begin work*** at a particular time if the person enters into a contract at that time to lease or license premises, or a space within premises, to the non-citizen or another person with the intention that the non-citizen will use the premises or space to perform sexual services (within the meaning of the Criminal Code).
174. This paragraph is only intended to capture persons who lease or license premises with the intention that the other party provides sexual services from those premises. Consistent with the intention of the comparable provision in current paragraph 245AG(2)(d) of the Migration Act, new paragraph 245AYC(1)(e) is designed to capture brothel owners who claim to be merely renting rooms to sex workers instead of providing employment.
175. New paragraph 245AYC(1)(f) creates a regulation-making power to allow for the Governor-General to prescribe any new forms of work arrangements that may emerge that do not fit within the intended scope of the meaning allows a non-citizen to begin work in new subsection 245AYC(1).

176. This provision mirrors current paragraph 245AG(2)(e) in Subdivision C. It provides flexibility to prescribe other situations in which a person allows a non-citizen to begin work to specifically cover these new employment or contractual relationships or arrangements.
177. A note has also been inserted to clarify that differing speech and grammatical forms of the term ‘allows a non-citizen to begin work’ have a corresponding meaning pursuant to current section 18A of the Acts Interpretations Act.
178. New subsection 245AYC(2) provides that, for the purposes of new paragraph 245AYC(1)(e), **premises** means an area of land or other place, whether or not it is enclosed or built on, a building or other structure, or a vehicle or vessel. This definition is intended to ensure that a person allows a non-citizen to begin work even where the premises are other than a building. For example, a person that leases a caravan with the intention that the lessee will use the caravan to provide sexual services would be captured by paragraph 245AYC(1)(e).

Meaning of prohibited employer

179. New section 245AYD provides that a person is a **prohibited employer** if a declaration in relation to the person has been made under subsection 245AYK(1), and the declaration is in effect at the time.

Migrant worker sanctions that trigger the ability to declare a prohibited employer

180. Migrant worker sanctions enable the Minister to make a declaration that a person is a prohibited employer.
181. There are a number of migrant worker sanctions which enliven the Minister’s power to make a prohibition declaration. These include sanctions, offences or civil penalties in the Migration Act, the Criminal Code and the Fair Work Act. Regulation-making powers enable the prescribing of further provisions.

Migrant worker sanction – bar placed on approved work sponsor and failure to comply with compliance notice

182. New section 245AYE outlines the circumstances in which a person is subject to a **migrant worker sanction** in relation to a bar being placed on an approved work sponsor.
183. Subsection 245AYE(1) provides that a person is subject to a migrant worker sanction:
 - if they are an approved work sponsor who is subject to a bar imposed under current paragraph 140M(1)(c) or (d) of the Migration Act;
 - and either:
 - they have not requested the Minister to waive the bar in accordance with any regulations made for the purposes of current section 140P; or

- if they have made such a request – the Minister has not waived the bar under current subsection 140O(2).

184. Subsection 245AYE(2) provides that a person is subject to a **migrant worker sanction** if the person is or was an approved work sponsor and a civil penalty order is made against them in relation to a contravention of new subsection 140RB(5).

Migrant worker sanction – conviction of work-related offence, offences, certain offences against humanity and certain offences against the Fair Work Act

185. New section 245AYF outlines the circumstances in which a person is subject to a **migrant worker sanction** as a result of being convicted of certain work-related offences.

186. Subsection 245AYF(1) provides that a person is subject to a migrant worker sanction if the person is convicted of a **work-related offence**. The definition of work-related offence is being inserted into current subsection 5(1) of the Migration Act.

187. Subsection 245AYF(2) provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:

- the person has been convicted of an offence against Division 270 (other than section 270.7B, or section 270.8 to the extent an offence against that section relates to an offence against section 270.7B) or Division 271 (other than Subdivision BA) of the Criminal Code;
- the person engaged in the relevant conduct in Australia; and
- the offence related, wholly or partly, to another person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa).

188. This provision excludes the crimes against humanity offences of forced marriage, organ trafficking and overseas travel by certain registered offenders from triggering a prohibition declaration, but includes offences such as slavery, servitude, forced labour, human trafficking and debt bondage. The inclusions and exclusions support coherence with the overarching focus of the Bill to address the exploitation of temporary migrant workers in Australia.

189. Subsection 245AYF(3) provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:

- the person has been convicted of an offence against the Fair Work Act, or a relevant workplace law, that is an offence of a kind prescribed by the regulations;
- the offence related, wholly or partly, to a prescribed person who, at the time the relevant conduct was engaged in, was a non-citizen (other than the holder of a permanent visa); and

- any circumstances prescribed by the regulations apply in relation to the offence.
190. New subsection 245AYF(3) provides for a regulation-making power to allow certain offences against the Fair Work Act and workplace laws to be prescribed as triggers. An offence can only be prescribed if it is against the Fair Work Act or relevant workplace law. The prescribed offence can only be used as a trigger if the underlying offence related, wholly or partly, to a prescribed person who was a non-citizen at the time of the offence. Circumstances applicable to the contravention can also be prescribed.
191. The design of this power seeks to ensure that only appropriate offences can be prescribed, and once prescribed, can only enliven the Minister's power to impose a migrant worker sanction in appropriate circumstances. Regulations made under this provision will be subject to disallowance.
192. The purpose of this regulation-making power is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation, ensuring that the scheme continues to remain fit for purpose in the future. Focusing the scope and application of the power aligns with scrutiny principles and best practice for provision of matters in delegated legislation, and ensures that the regulation-making power is appropriately targeted to achieving the scheme's overarching objectives as a measure under the legislative framework that supports migration, namely the Migration Act.

Migrant worker sanction – contravention of certain civil penalty provisions in the Migration Act and certain provisions of relevant workplace laws

193. New section 245AYG sets out the civil penalty provisions and certain provisions of relevant workplace laws that are **migrant worker sanctions**. New subsection 245AYG(1) relates to certain civil penalty provisions in the Migration Act, while subsection 245AYG(2) relates to certain provisions of relevant workplace laws.
194. New subsection 245AYG(1) provides that a person is subject to a migrant worker sanction if a civil penalty order is made against the person in relation to the contravention of:
- a **work-related provision**; or
 - another civil penalty prescribed by the regulations, in certain circumstances.
195. For a civil penalty prescribed by the regulations, a person is only subject to a migrant worker sanction if the contravention of the civil penalty that is prescribed relates, wholly or partly, to an employee of the person and, at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa).
196. New subsection 245AYG(2) provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:

- a court has made an order under a relevant workplace law (that was not made in criminal proceedings) that the person pay a pecuniary penalty for the contravention of that law;
- the provision is prescribed by the regulations;
- the order was not made in criminal proceedings;
- the contravention related, wholly or partly, to a prescribed person who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
- any circumstances prescribed by the regulations apply in relation to the contravention.

197. Relevant workplace law has the meaning given by new subsection 245APA(2).
198. New subsections 245AYG(1) and (2) provide for regulation-making powers for matters to be prescribed for the purposes of a migrant worker sanction. A provision can only be prescribed if it is a certain type of provision. The prescribed provisions can only be used if the underlying contravening conduct related, wholly or partly, to a prescribed person who was a non-citizen at the time of the conduct.
199. The design of this power ensures that only appropriate matters can be prescribed, and once prescribed, can only enliven the Minister's power to impose a migrant worker sanction in appropriate circumstances. This provides governance over the power, given what is prescribed will reside in subordinate legislation. Regulations made under these provisions will be subject to disallowance.
200. The purpose of this regulation-making power is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation, ensuring that the scheme continues to remain fit for purpose in the future. Focusing the scope and application of the power aligns with scrutiny principles and best practice for provision of matters in delegated legislation, and ensures that the regulation-making power is appropriately targeted to achieving the scheme's overarching objectives.

Migrant worker sanction - contravention of certain civil remedy provisions of the Fair Work Act

201. New section 245AYH sets out the contraventions of civil remedy provisions in the Fair Work Act that are **migrant worker sanctions**. These include contraventions of relevant **fair work provisions**, specified provisions in the Fair Work Act, contraventions relating to the advertisement of rates of pay, and contraventions relating to compliance notices.
202. New subsection 245AYH(1) relates to contravention of relevant fair work provisions and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:

- a FW order has been made against the person in relation to a contravention for a relevant fair work provision;
 - the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener); and
 - the contravention related, wholly or partly, to an employee, prospective employee or former employee, who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa).
203. New subsection 245AYH(2) concerns contraventions relating to remuneration matters and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- a FW order has been made against the person in relation to a contravention of specified provisions of the Fair Work Act;
 - the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener);
 - the contravention related, wholly or partly, to an employee, who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
 - the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee.
204. The provisions of the Fair Work Act for which a contravention can result in a FW order for the purposes of this subsection are listed in new paragraph 245AYH(2)(a). **Remuneration-related matter** is defined in new subsection 245AYB.
205. New subsection 245AYH(3) relates to contraventions relating to the advertisement of rates of pay and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- a FW order has been made against the person in relation to a contravention of current subsection 536AA(1) or (2) of the Fair Work Act (which provide for employer obligations in relation to advertising rates of pay), and the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener); or
 - a FW order has been made against the person in relation to a contravention of current subsection 716(5) (which relates to a failure to comply with a compliance notice), the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener), and the underlying compliance notice related to a contravention of current subsection 536AA(1) and (2).

206. New subsection 245AYH(4) relates to contraventions relating to compliance notices and provides that a person is subject to a ***migrant worker sanction*** if the Minister is satisfied that:
- a FW order has been made against the person in relation to a contravention of current subsection 716(5) of the Fair Work Act (which relates to a failure to comply with a compliance notice);
 - the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener);
 - the compliance notice related to a contravention of certain provisions of the Fair Work Act;
 - the contravention related, wholly or partly, to an employee who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
 - the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee, in the case of a contravention of a provision or term in: a provision of the National Employment Standards; a term of a modern award; a term of an enterprise agreement; or a term of a workplace determination.
207. The provisions for which the underlying compliance notice can relate to for the purposes of this subsection are listed in new paragraph 245AYH(4)(c).
208. New subsection 245AYH(5) provides that a person is subject to a ***migrant worker sanction*** if the Minister is satisfied that:
- a FW order has been made against the person in relation to a contravention of a civil remedy provision in Fair Work Act;
 - the FW order was not made on the basis that the person was involved in the contravention (that is, the person was not an accessory, rather was the main contravener);
 - the provision is prescribed by the regulations; and
 - any circumstances prescribed by the regulations apply in relation to the contravention.
209. New subsection 245AYH(6) provides that a person is subject to a migrant worker sanction if the Minister is satisfied that:
- a FW order has been made against the person in relation to a contravention of a civil remedy provision in Fair Work Act;

- the FW order was made on the basis that the person was involved in the contravention (that is, the person was an accessory rather than the main contravener);
 - the provision is prescribed by the regulations; and
 - any circumstances prescribed by the regulations apply in relation to the contravention.
210. New subsections 245AYH(5) and (6) provide for a regulation-making power for matters to be prescribed for the purposes of a migrant worker sanction.
211. The purpose of these regulation-making powers is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation. While the power is limited in terms of provisions that can be prescribed, being civil remedy provisions in the Fair Work Act, it is expressed broadly in terms of the circumstances that can be prescribed. The intention is to predominately cover circumstances that relate to migrant workers, however noting that other circumstances may arise and that can be appropriate to cover to ensure the overarching scheme continues to operate as intended and remains fit for purpose. Regulations made under these provisions will be subject to disallowance.

Migrant worker sanction – contravention of term of enforceable undertaking

212. New subsection 245AYI(1) relates to contraventions of a term of an enforceable undertaking in relation to a relevant fair work provision determined by a court, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of a relevant fair work provision; and
 - a court has made one or more orders under current subsection 715(7) of the Fair Work Act in relation to the undertaking; and
 - the contravention related, wholly or partly, to an employee, prospective employee or former employee, who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa).
213. New subsection 245AYI(2) relates to the Minister being satisfied of a contravention of a term of an enforceable undertaking in relation to a fair work provision, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of a relevant fair work provision; and

- the undertaking has not been withdrawn and an application for certain orders in current subsection 715(7) of the Fair Work Act has not been made, or a court has not made such orders; and
 - the contravention related, wholly or partly, to an employee, prospective employee or former employee, who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
 - the person has contravened a term of the undertaking.
214. New subsection 245AYI(3) relates to contraventions of a term of an enforceable undertaking in relation to certain Fair Work Act provisions determined by a court, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of certain provisions in the Fair Work Act; and
 - a court has made one or more orders under current subsection 715(7) of the Fair Work Act in relation to the undertaking; and
 - the contravention related, wholly or partly, to an employee who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and
 - the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee, in the case of a contravention of a provision or term in: a provision of the National Employment Standards; a term of a modern award; a term of an enterprise agreement; or a term of a workplace determination.
215. New subsection 245AYI(4) relates to the Minister being satisfied of a contravention of a term of an enforceable undertaking in relation to certain Fair Work Act provisions, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of certain provisions in the Fair Work Act; and
 - the undertaking has not been withdrawn and an application for certain orders in current subsection 715(7) of the Fair Work Act has not been made, and a court has not made such orders; and
 - the contravention related, wholly or partly, to an employee who, at the time of the contravention, was a non-citizen (other than the holder of a permanent visa); and

- the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee, in the case of a contravention of a provision or term in: a provision of the National Employment Standards; a term of a modern award; a term of an enterprise agreement; or a term of a workplace determination; and
 - the person has contravened a term of the undertaking.
216. New subsection 245AYI(5) relates to contraventions of a term of an enforceable undertaking determined by a court relating to advertised rates of pay, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of current subsection 536AA(1) or (2) of the Fair Work Act (employer obligations in relation to advertising rates of pay); and
 - a court has made one or more orders under current subsection 715(7) of the Fair Work Act in relation to the undertaking.
217. New subsection 245AYI(6) relates to the Minister being satisfied of a contravention of a term of an enforceable undertaking relating to advertised rates of pay, and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of current subsection 536AA(1) or (2) of the Fair Work Act (employer obligations in relation to advertising rates of pay); and
 - the undertaking has not been withdrawn and an application for certain orders in current subsection 715(7) of the Fair Work Act has not been made, or a court has not made such orders; and
 - the person has contravened a term of the undertaking.
218. New subsection 245AYI(7) provides regulation-making powers to ensure that contravention of a term of an enforceable undertaking in relation to other provisions can be prescribed and trigger the making of a prohibition declaration.
219. New subsection 245AYI(7) provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- the FWO has accepted an undertaking given by the person under current section 715 of the Fair Work Act in relation to a contravention of a civil remedy provision (within the meaning of the Fair Work Act); and
 - the provision is prescribed by the regulations; and
 - any circumstances prescribed by the regulations apply in relation to the undertaking.

220. The purpose of these regulation-making powers is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation. While the power is limited in terms of provisions that can be prescribed, being enforceable undertakings accepted in relation contraventions of civil remedy provisions in the Fair Work Act, it is expressed broadly in terms of the circumstances and provisions that can be prescribed. The intention is to predominately cover circumstances that that relate to migrant workers, however noting that other circumstances may arise and that can be appropriate to cover to ensure the overarching scheme continues to operate as intended and remains fit for purpose. Regulations made under these provisions will be subject to disallowance.

Migrant worker sanction – failure to comply with certain compliance notices

221. New section 245AYJ sets out where failures to comply with certain compliance notices issued in relation to certain matters are **migrant worker sanctions**. These include failure to comply with compliance notices issues in relation to contravention of remuneration-related matters and contraventions relating to the advertisement of rates of pay.
222. New subsection 245AYJ(1) relates to failure to comply with compliance notices issued in respect of particular remuneration-related matters and provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- an inspector has given the person a compliance notice under current subsection 716(2) of the Fair Work Act in relation to a contravention of: a provision of the National Employment Standards; a term of a modern award; a term of an enterprise agreement; a term of a workplace determination; a term of a national minimum wage order; or a term of an equal remuneration order, and
 - a court has confirmed the compliance notice after reviewing it under current subsection 717(1) of the Fair Work Act, and
 - the contravention related, wholly or partly, to an employee of the person, and at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
 - in relation to a contravention of a provision of the National Employment Standards, a term of a modern award, a term of an enterprise agreement or a term of a workplace determination, the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee; and
 - the person failed to comply with the compliance notice and does not have a reasonable excuse for their failure to comply.
223. New subsection 245AYJ(2) provides that a person is subject to a **migrant worker sanction** if the Minister is satisfied that:
- an inspector has given the person a compliance notice under current subsection 716(2) of the Fair Work Act in relation to a contravention of: a provision of the National Employment Standards; a term of a modern award; a term of an

enterprise agreement; a term of a workplace determination; a term of a national minimum wage order; or a term of an equal remuneration order; and

- the compliance notice has not been withdrawn, an application has not been made under current subsection 717(1) of the Fair Work Act, and a court has not made such orders; and
- the contravention related, wholly or partly, to an employee of the person, and at the time of the contravention, the employee was a non-citizen (other than the holder of a permanent visa); and
- in relation to a contravention of a provision of the National Employment Standards, a term of a modern award, a term of an enterprise agreement or a term of a workplace determination, the contravention related, wholly or partly, to one or more remuneration-related matters in relation to the employee; and
- the person failed to comply with the compliance notice and does not have a reasonable excuse for their failure to comply with the compliance notice.

224. New subsection 245AYJ(3) deals with compliance notices in relation to a contravention relating to the advertisement of rates of pay and provides a person is subject to a ***migrant worker sanction*** if the Minister is satisfied that:

- an inspector has given the person a compliance notice under current subsection 716(2) of the Fair Work Act in relation to a contravention of current subsection 536AA(1) or (2) of the Fair Work Act, and
- a court has confirmed the compliance notice after reviewing it under subsection 717(1) of the Fair Work Act, and
- the person failed to comply with the compliance notice and does not have a reasonable excuse for their failure to comply.

225. New subsection 245AYJ(4) provides that a person is subject to a ***migrant worker sanction*** if the Minister is satisfied that:

- an inspector has given the person a compliance notice under current subsection 716(2) of the Fair Work Act in relation to a contravention of current subsection 536AA(1) or (2) of the Fair Work Act, and
- the compliance notice has not been withdrawn, an application has not been made under current subsection 717(1) of the Fair Work Act, and a court has not made such orders, and
- the person failed to comply with the compliance notice and does not have a reasonable excuse for their failure to comply.

Declaration of person as a prohibited employer

226. New section 245AYK establishes the power for the Minister to declare a person to be a prohibited employer. This section also provides for the process to be followed before making a declaration; what the Minister must consider in making a decision to declare a person to be a prohibited employer; notification requirements; the duration of the declaration; as well as providing for review of the decision by the AAT.
227. The amendments inserted by this Part of the Bill, particularly the power to declare a person to be a prohibited employer, provide for a scheme that is protective of an important public interest and are not punitive in nature. These provisions fundamentally seek to protect migrant workers from exploitation, by preventing employers who have already been found to contravene various fair work and work-related provisions from engaging future migrant workers, and assisting future migrant workers to avoid exploitation by making public a list of prohibited employees.
228. New subsection 245AYK(1) provides that the Minister may in writing declare a person to be a prohibited employer if the person subject to a migrant worker sanction and it has not yet been five years since the day the person became subject to the migrant worker sanction.
229. A note has also been inserted that clarifies a person may be subject to a migrant worker sanction under more than one provision or subject to a migrant worker sanction multiple times under a single provision, and that there is a separate five year period each time.
230. New subsection 245AYK(2) provides that a declaration made under new subsection 245AYK(1) is not a legislative instrument.
231. A note below this subsection provides that a declaration made under new subsection 245AYK(1) can be varied or revoked in accordance with current subsection 33(3) of the Acts Interpretation Act.
232. New subsection 245AYK(3) sets out the process that must be followed before the Minister can declare a person to be a prohibited employer. This subsection provides that the Minister must give the person a written notice stating that the Minister proposes to make such a declaration, and the reasons for it. The written notice must also invite the person to make a written submission to the Minister, setting out reasons why the Minister should not make the declaration.
233. New subsection 245AYK(4) establishes the period within which the person is to make a written submission to the Minister, when invited to do so under new paragraph 245AYK(3)(b). Unless a longer period is stated in the notice given under new subsection 245AYK(4)(b), the period ends 28 days after the day the person is given notice by the Minister.
234. New subsection 245AYK(5) sets out what the Minister must consider in making a decision whether to declare a person to be a prohibited employer. This includes:
- any written submission made by the person, so long as it is received by the Minister within the required period; and

- any criteria prescribed by the regulations.
235. The Minister must consider criteria for the purposes of new paragraph 245AYK(5)(b) in making a decision to declare a person to be a prohibited employer. Without limiting what might be prescribed, such criteria might relate to matters such as:
- the seriousness of the offence or contravention leading to the person being the subject of the migrant worker sanction (including consideration of any aggravating factors), recognising the underlying intent is to protect additional temporary migrant workers from employers found to have engaged in serious, deliberate or repeated non-compliance in their treatment of temporary migrant workers; or
 - the potential impact on the viability of the person's business if declared a prohibited employer, particularly in relation to the person's capacity to attract and recruit new employees while subject to the prohibition.
236. By providing for the criteria to be prescribed by the Regulations, this ensures appropriate ability to review and adjust the criteria as needed, while also ensuring that there is appropriate parliamentary oversight. The Regulations would be subject to disallowance.
237. New subsection 245AYK(6) provides that if the Minister declares a person to be a prohibited employer, the Minister must, as soon as reasonably practicable, give the person a copy of the declaration.
238. New subsection 245AYK(7) provides that the declaration comes into effect at the start of whichever of the following days is later:
- the day after the day the declaration is given to the prohibited employer; or
 - the day stated in the declaration as the day the declaration comes into effect.
239. New subsection 245AYK(8) provides that the declaration has effect during the period specified in the declaration (unless revoked sooner).
240. This provision does not include a limit on the period for which a declaration has effect. This ensures that the Minister has the discretion to specify a period that the Minister considers proportionate to the nature and significance of the migrant worker sanction that gives rise to consideration of whether to declare the person to be a prohibited employer. Matters raised by the person in their written submission to the Minister under new subsection 245AYK(3) may also be taken into account in determining the declaration's period of effect.
241. New subsection 245AYK(9) provides that applications may be made to the AAT for review of a decision under subsection 245AYK(1) to declare a person to be a prohibited employer.

242. A note immediately below new subsection 245AYK(9) provides that current section 27A of the *Administrative Appeals Act* 1975 (the AAT Act) requires that people whose interests are affected by the Minister's decision be given notice of their rights to seek review of the decision. Where a person is declared to be a prohibited employer, that person will be given a copy of the declaration as soon as reasonably practicable, as required under new subsection 245AYK(6). Having regard to current sections 27A and 28 of the AAT Act, the person will also be given notice of their rights to seek review of the decision, and a statement of reasons for that decision.

Prohibition on allowing additional non-citizens to begin work

243. New section 245AYL establishes the prohibition on allowing additional non-citizens to begin work.
244. New subsection 245AYL(1) provides that a person contravenes this subsection if that person is a prohibited employer, and that person either allows a non-citizen to begin work or has a material role in a decision made by a body corporate to allow a non-citizen to begin work, and the non-citizen is either an unlawful non-citizen, or a lawful non-citizen (who is not the holder of a permanent visa).
245. The purpose of new subsection 245AYL(1) is to prevent a person who is a prohibited employer from allowing additional non-citizens to begin work. This is not intended to prevent a non-citizen who has an established work relationship with the person – before that person is declared to be a prohibited employer – from continuing to work for the employer.
246. New subsection 245AYL(2) provides that a person commits an offence if they contravene subsection 245AYL(1). The maximum penalty for an offence is 2 years imprisonment or 360 penalty units, or both.
247. New subsection 245AYL(3) provides that the fault element for subparagraph 245AYL(1)(b)(ii) is intention by the first person.
248. Under the Criminal Code, where legislation does not specify any fault element for a criminal offence, the default fault elements will be imported. As the physical element in subparagraph 245AYL(1)(b)(i) is conduct, the default fault element for this physical element would be intention. However, as the physical element in subparagraph 245AYL(1)(b)(ii) is a circumstance or result, the default fault element for this physical element would be recklessness.
249. To align the constitution of the offence, and to ensure it achieves the policy intent of being an offence of intention, new subsection 245AYL(3) provides that the fault element for subparagraph 245AYL(1)(b)(ii) is intention.
250. New subsection 245AYL(4) provides that a person who contravenes subsection 245AYH(1) is liable to a civil penalty of 240 penalty units. A note under new subsection 245AYJ(4) draws the reader's attention to current section 486ZF of the Migration Act. Current section 486ZF provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order.

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

Publishing information about prohibited employers

252. New section 245AYM establishes a requirement for the Minister to publish certain information about a prohibited employer on the Department's website.

253. New subsection 245AYM(1) provides that if the Minister has declared a person to be a prohibited employer, the Minister must cause the following information to be published on the Department's website:

- the name of the person;
- the ABN of the person (if they have an ABN);
- any other information that the Minister considers is reasonably necessary to identify the person;
- the reasons as to why the person has been declared a prohibited employer; and
- the period during which the declaration has effect.

254. New subsection 245AYM(2) provides for an exception to the requirement in new subsection 245AYK(1), in the prescribed circumstances.

255. New subsection 245AYM(3) prohibits personal information about any individual other than the prohibited employer from being published under subsection 245AYM(1).

256. New subsection 245AYM(4) provides that no civil liability arises from action taken by a person in good faith in publishing information under new subsection 245AYM(1). This ensures the integrity of the scheme by allowing persons to be confident that publishing information in good faith will not attract any civil liability.

257. New subsection 245AYM(5) makes clear that the Minister is not required to arrange for the removal, from the Department's website, of information about a person published under new subsection 245AYM(1) when the person stops being a prohibited employer. Relevantly, although the Minister is not required to arrange for the removal of this information, the intention is that such information would be removed from the Department's website as soon as reasonably practicable after the person stops being a prohibited employer.

258. APPs 10 and 13 outline an APP entity's responsibility to take reasonable steps to ensure information is accurate, up-to-date, complete and relevant, and to take action to correct any information that has become inaccurate or out of date. There are no authorised by law exemptions to these APPs, but rather compliance is required when reasonable in the circumstances.

Former prohibited employers – additional reporting obligations

259. New section 245AYN establishes reporting obligations on a person who was previously a prohibited employer.
260. New subsection 245AYN(1) provides new section 245AYN applies if a person was a prohibited employer for a particular period and the person allows a lawful non-citizen who is not a permanent visa holder to begin work on a particular day during the 12-month period starting on the day after the prohibition period ends.
261. New subsection 245AYN(2) prescribes the matters which a prohibited employer must, before the end of the 28-day period, provide written notice of. They are:
- the name of the non- citizen;
 - the kind of visa held by the non-citizen;
 - the work to be done by the non-citizen;
 - if the non- citizen holds a visa that is subject to one or more work- related conditions: each of those conditions; and a statement that the non-citizen will not be in breach of those conditions solely because of doing that work; and
 - any other prescribed information.
262. The purpose of new subsection 245AYN(2) is to establish that former prohibited employers are subject to additional reporting requirements for the duration of the 12-month period after they have ceased being a prohibited employer. The effect of this provision is that the former prohibited employer must provide the Department with certain information in relation to any lawful non-citizens that they employ within the 12-month period. The aim is to ensure the (previously) prohibited employer is mindful of their obligations to uphold visa program integrity under the Migration Act. This requirement does not apply in relation to non-citizens who hold a permanent visa.
263. New subsection 245AYN(3) provides that a person who contravenes subsection 245AYN(2) is liable for a civil penalty of 48 penalty units. Current section 486ZF of the Migration Act provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order. The note under new paragraph 245AYN(4) draws the reader's attention to this provision.
264. The penalty of 48 penalty units is appropriate in this case given the civil penalty provision relates to reporting obligations. The penalty amount aligns with the seriousness of other penalties for civil penalty provisions being inserted by these reforms.

265. New subsection 245AYN(4) provides that for the purposes of paragraph 245AYN(2)(e), personal information may be prescribed only to the extent that it is reasonably necessary for monitoring compliance with this Division.
266. The intention of this provision is to limit the scope of personal information that may be prescribed in the Regulations by reference to its purpose, while providing appropriate flexibility in relation to the information (including personal information) that may be identified as necessary, to be prescribed by regulations made for the purposes of new paragraph 245AYN(2)(e). This may cover both personal information of a non-citizen and personal information of an individual who is a prohibited employer – for example, where personal information may be required to identify if that person is a prohibited employer, having a material role in the decision of a body corporate to employ a non-citizen.

Contravening civil penalty provisions

267. New section 245AYO describes the effect of contravening civil penalty provisions.
268. New subsection 245AYO(1) provides it applies if a civil penalty provision in this Subdivision provides that a person contravening another provision of this Subdivision (the **conduct rule provision**) is liable to a civil penalty.
269. New subsection 245AYO(2) provides that for the purposes of this Act, the person is taken to contravene the conduct rule provision.

Item 6 Section 487A

270. This item amends current section 487A of the Migration Act by repealing the definitions of **work-related offence** and **work-related provision**. This is a consequential amendment to import the definitions into current subsection 5(1) of the Migration Act.
271. The purpose of this amendment is to provide that the defined terms **work-related offence** and **work-related provision** are terms of general application in the Migration Act, defined in subsection 5(1). This ensures that where these terms are relied on, whether in Subdivision C of Division 12 of Part 2 of the Migration Act, or later in Part 8E, they have one, consistent meaning.

Division 2 Application provisions

Item 7 Application—bar placed on approved work sponsor etc.

272. Subitem (1) of this item provides that new subsection 245AYE(1), as inserted by this Part, applies in relation to a bar placed on a person under current paragraph 140M(1)(c) or (d) of the Migration Act on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the bar can occur before, on or after the commencement of this item.

273. Subitem (2) of this item provides that new subsection 245AYE(2), as inserted by this Part, applies in relation to a civil penalty order made on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the civil penalty order can occur before, on or after the commencement of this item.

Item 8 Application—conviction of work related offence etc.

274. This item provides that new section 245AYF, as inserted by this Part, applies in relation to a conviction that occurs on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the conviction can occur before, on or after the commencement of this item.

Item 9 Application—contravention of certain civil penalty provisions etc.

275. Subitem (1) of this item provides that new subsection 245AYG(1), as inserted by this Part, applies in relation to a civil penalty order made on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the civil penalty order can occur before, on or after the commencement of this item.
276. Subitem (2) of this item provides that new subsection 245AYG(2), as inserted by this Part, applies in relation to an order made under a relevant workplace law on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the order can occur before, on or after the commencement of this item.

Item 10 Application—contravention of certain civil remedy provisions of the Fair Work Act

277. This item provides that new section 245AYH, as inserted by this Part, applies in relation to a FW order made on or after the commencement of this item. It is intended that conduct (including an omission) giving rise to the FW order can occur before, on or after the commencement of this item.

Item 11 Application—contravention of term of enforceable undertaking etc.

278. This item provides that new section 245AYI applies in relation to an undertaking accepted under current section 715 of the Fair Work Act on or after commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

Item 12 Application—failure to comply with certain compliance notices

279. This item provides that new section 245AYJ applies in relation to a compliance notice given under current subsection 716(2) of the Fair Work Act on or after commencement of this item (whether the relevant conduct or omission was engaged in before, on or after that commencement).

Part 3 Aligning and increasing penalties for work-related breaches

Migration Act 1958

280. The amendments in this Part increase the maximum pecuniary penalties that apply in relation to the various ***work-related offences*** and ***work-related provisions*** in the Migration Act, as well as the civil penalty provisions under current section 140Q in relation to sponsorship obligations for an approved work sponsor. The increases largely align these penalties with the pecuniary penalties available in relation to the offences and civil penalty provisions under current sections 245AR and 245AS of the Migration Act, which deal with giving or receiving a benefit in return for the occurrence of a sponsorship-related event.
281. The AGD Framing Guide has been considered in relation to the amendments in this Part, particularly the guidance in relation to setting an appropriate penalty. Relevantly, the AGD Framing Guide observes that “[a] maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging.”
282. Increasing the available pecuniary penalties is intended to send a strong message to employers and other persons involved in the employment of temporary migrant workers, that a contravention of the provisions of the Migration Act relating to temporary migrant workers constitutes a serious breach. Such contraventions are damaging to the integrity of our migration system.
283. The increases to the pecuniary penalties in this Part result in a revised penalty framework that is more appropriate and proportionate than the current penalty regime. The increased penalties better reflect the seriousness of illegal work practices and the exploitation of temporary migrant workers, and are intended to allow for more appropriate deterrence and punishment of wilful and serious offending. The amendments increase the pecuniary penalties available to reflect the gains that individuals and businesses might obtain, or seek to obtain, from engaging in conduct that contravenes relevant provisions of the Migration Act.
284. For pecuniary penalties to have a deterrent effect, they must be set at a level that actually deters people from contravening and offending. These increased penalties reflect the severity of the impact of a contravention on the individual temporary migrant worker directly affected by that conduct, but also the significant damage that the actions of unscrupulous employers or third parties can have on Australia’s visa program integrity and its reputation as a destination of choice for prospective migrant workers. Combined with an uplift in enforcement and measures to support increased reporting, these increases should assist in changing non-compliant behaviour by employers.

Increases to penalty units for civil penalties

285. Table 1.1 below sets out the increased civil penalties under the various work-related provisions in Subdivision C of Division 12 of Part 2 of the Migration Act.

Increases to pecuniary penalties in relation to specified civil penalties under the Migration Act

Table 1.1 – civil penalty provisions where the maximum pecuniary penalty has been increased

	Current maximum penalty units	New maximum penalty units	Brief description
140Q(1)	60	approved work sponsor – 240 other – 60*	failing to satisfy sponsorship obligations
140Q(2)	60	240	failing to satisfy sponsorship obligations (party to a work agreement)
245AB(5)	90	240	allowing an unlawful non-citizen to work
245AC(5)	90	240	allowing a lawful non-citizen to work in breach of a work-related condition
245AE(5)	90	240	referring an unlawful non-citizen for work
245AEA(5)	90	240	referring a lawful non-citizen for work in breach of a work-related condition
245AK(2)	90	240	civil liability of executive officers of bodies corporate

**Note:* While the pecuniary penalty for failing to meet a sponsorship obligation under subsections 140Q(1) and (2) is increased to 240 penalty units for an approved work sponsor, the penalty remains 60 penalty units for any other case. The Sponsorship Framework under the Migration Act also extends to family sponsors, who are outside the scope of these amendments.

Work-related offences – changes to penalties and increases to penalty units

286. Table 1.2 sets out the increased pecuniary penalties available for an offence against work-related offences under the Migration Act.

Increases to **pecuniary penalties** for work-related offences under the Migration Act

Table 1.2 – offences where the maximum penalty has been increased	Current maximum penalty	New maximum penalty	Brief description
245AB(3)	2 years imprisonment	2 years imprisonment or 360 penalty units or both	allowing an unlawful non-citizen to work
245AC(3)	2 years imprisonment	2 years imprisonment or 360 penalty units or both	allowing a lawful non-citizen to work in breach of a work-related condition
245AD(1) and (2)	5 years imprisonment	5 years imprisonment or 900 penalty units or both	aggravated offences if a person allows, or continues to allow, another person to work
245AE(3)	2 years imprisonment	2 years imprisonment or 360 penalty units or both	referring an unlawful non-citizen for work
245AEA(3)	2 years imprisonment	2 years imprisonment or 360 penalty units or both	referring a lawful non-citizen for work in breach of a work-related condition
245AEB(1) and (2)	5 years imprisonment	5 years imprisonment or 900 penalty units or both	aggravated offences if a person refers another person to a third person for work

Item 13 Subsection 140Q(1) (penalty)

Item 14 Subsection 140Q(2) (penalty)

287. These items repeal the civil penalty under each of **subsections 140Q(1) and (2)**, and substitutes a **new civil penalty**. As amended, a person who contravenes subsection 140Q(1) is liable to a penalty of 240 penalty units if that person is an approved work sponsor, and 60 penalty units in any other case, and 240 penalty units for a contravention of subsection 140Q(2). The term ***approved work sponsor*** is relevantly defined under current subsection 5(1) of the Migration Act.

288. Current subsections 140Q(1) and 140Q(2) of the Migration Act are civil penalty provisions that apply if a person has failed to satisfy applicable sponsorship obligations. If a person contravenes current subsection 140Q(1) or 140Q(2), they are liable to a civil penalty of 60 penalty units.

289. The increased pecuniary penalty in relation to approved work sponsors ensures alignment across the civil penalty provisions relevant to employers and other persons involved in the employment of non-citizens. The increased penalty is proportionate to the seriousness of failing to meet sponsorship obligations as an approved work sponsor, and is intended to deter non-compliance with provisions of the Migration Act that are intended to protect non-citizens working in Australia.
290. As amended, the civil penalties under subsections 140Q(1) and (2) differentiate the civil penalty available in relation to an approved work sponsor from other cases. While the pecuniary penalty for failing to meet a sponsorship obligation under subsections 140Q(1) and (2) is increased to 240 penalty units for an approved work sponsor, the penalty remains at 60 penalty units for any other case. This ensures that the amendments are appropriately targeted, noting the Sponsorship Framework in the Migration Act also extends to family sponsors, who are outside the scope of the amendments of the Migration Act by the Schedule to this Bill.

Item 15 Subsection 245AB(3)

291. This item repeals the current offence provision at subsection 245AB(3) of the Migration Act, and substitutes a new offence provision, with an increased penalty, as new subsection 245AB(3).
292. Current subsection 245AB(1) provides that a person (the *first person*) contravenes this subsection if:
- the first person allows, or continues to allow, another person (the *worker*) to work; and;
 - the worker is an unlawful non-citizen.
293. New subsection 245AB(3) is equivalent in effect to current subsection 245AB(3), aside from the penalty.
294. Subsection 4B(2) of the Crimes Act provides that where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula (term of imprisonment x 5), where the ‘term of imprisonment’ is the maximum term of imprisonment, expressed in months, by which the offence is punishable.
295. Under current subsection 245AB(3), the maximum pecuniary penalty available on conviction for an offence against subsection 245AB(1), as calculated under subsection 4B(2) of the Crimes Act, would be 120 penalty units.

296. The maximum pecuniary penalty of 360 penalty units under new subsection 245AB(3) is set substantially higher than the standard penalty unit/imprisonment ratio provided for in subsection 4B(2) of the Crimes Act. Given the nature of the conduct covered by section 245AB as amended, it is appropriate that the pecuniary penalty available for the offence is set at the same amount as for current section 245AR, particularly where a lower pecuniary penalty may be perceived as able to be offset against the potential unlawful gains from committing the offence. This amendment is intended to send a clear signal that offences against section 245AB as amended are viewed seriously, and that an offence against section 245AB warrants a significant penalty.
297. The note to new subsection 245AB(3) advises that in accordance with current subsection 13.3(3) of the Criminal Code, a defendant bears the evidential burden in relation to proving the matter in subsection 245AB(2). Current subsection 13.3(6) of the Criminal Code provides an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This remains appropriate as the matters that compromise the defence are peculiarly within the knowledge of the defendant as they relate to actions taken by the defendant to verify certain matters. It would be more difficult and costly for the prosecution to have to prove these matters due to the nature and possession of the evidence required to establish these matters.

Item 16 Subsection 245AB(5)

298. This item repeals the civil penalty provision at current subsection 245AB(5) of the Migration Act, and substitutes a new civil penalty provision, with an increased civil penalty of 240 penalty units, as new subsection 245AB(5).
299. Current subsection 245AB(5) provides that a person is liable to a civil penalty if the person contravenes current subsection 245AB(1). Under current subsection 245AB(5), the maximum civil penalty for contravention of that provision is 90 penalty units.
300. Civil penalties must also be read with current paragraph 486R(5)(a) of the Migration Act, which provides that the pecuniary penalty for a contravention of a civil penalty provision must not be more than five times the amount of the pecuniary penalty specified for the civil penalty provision, if the person is a body corporate.
301. Civil penalties must also be read with subsection 486R(6) of the Migration Act, which provides that in determining the amount of the pecuniary penalty, the court must take into account all relevant matters, including the matters listed in that subsection.
302. The note to new subsection 245AB(5) provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order and refers the reader to section 486ZF of the Migration Act.

303. Current section 486ZF provides that in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, (other than subsection 245AK(2)), it is not necessary to prove the person's intention, knowledge, recklessness, negligence or any other state of mind of the person.
304. The effect of this note is to clarify that it is sufficient to establish that a person contravened new subsection 245AB(1) by allowing, or continuing to allow, an unlawful non-citizen to work. This is clearly distinguished from the requirement to prove the fault elements of knowledge or recklessness in relation to paragraph 245AB(1)(b) in a criminal offence.
305. This means that a person is liable to a civil penalty under new subsection 245AB(5) without knowing or being reckless as to whether a worker is an unlawful non-citizen, if they allow or continue to allow that worker to work.

Item 17 Subsection 245AC(3)

306. This item repeals the offence provision at current subsection 245AC(3) of the Migration Act, and substitutes a new offence provision and penalty, as new subsection 245AC(3).
307. Current section 245AC of the Migration Act deals with allowing a lawful non-citizen to work in breach of a ***work-related condition***. The maximum penalty for an offence under current subsection 245AC(3) is 2 years imprisonment.
308. New subsection 245AC(3) is equivalent in effect to current subsection 245AC(3), aside from the penalty. The penalty under new subsection 245AC(3) provides that the new maximum penalty for an offence under new subsection 245AC(3) is 2 years imprisonment, or 360 penalty units, or both.
309. This penalty must also be read with subsection 4B(2) of the Crimes Act.
310. Under current subsection 245AC(3), the maximum pecuniary penalty available on conviction for an offence against subsection 245AC(1), as calculated under subsection 4B(2) of the Crimes Act, would be 120 penalty units.
311. The maximum pecuniary penalty of 360 penalty units under new subsection 245AC(3) is set substantially higher than the standard penalty unit/imprisonment ratio provided for in section 4B of the Crimes Act. Given the nature of the conduct covered by section 245AC as amended, it is appropriate that the pecuniary penalty available for the offence is set at the same amount as for current section 245AR, particularly where a lower pecuniary penalty may be perceived as able to be offset against the potential unlawful gains from committing the offence. This amendment is intended to send a clear signal that offences against section 245AC as amended are viewed seriously, and that an offence against section 245AC warrants a significant penalty.

312. The note to new subsection 245AC(3) advises that in accordance with subsection 13.3(3) of the Criminal Code, a defendant bears the evidential burden in relation to proving the matter in subsection 245AC(2). Current subsection 13.3(6) of the Criminal Code provides an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This remains appropriate as the matters that compromise the defence are peculiarly within the knowledge of the defendant as they relate to actions taken by the defendant to verify certain matters. It would be more difficult and costly for the prosecution to have to prove these matters due to the nature and possession of the evidence required to establish these matters.

Item 18 Subsection 245AC(5)

313. This item repeals the civil penalty provision at current subsection 245AC(5) of the Migration Act, and substitutes a new civil penalty provision, with an increased civil penalty, as new subsection 245AC(5).
314. Current section 245AC of the Migration Act deals with allowing a lawful non-citizen to work in breach of a ***work-related condition***. The maximum civil penalty is 90 penalty units.
315. New subsection 245AC(5) is equivalent in effect to current subsection 245AC(5), aside from the penalty. Under new subsection 245AC(5), the maximum civil penalty for which a person is liable if the person contravenes current subsection 245AC(1) is 240 penalty units.
316. The note to new subsection 245AC(5) provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order and refers the reader to section 486ZF of the Migration Act.

Item 19 Subsections 245AD(1) and (2) (penalty and note)

317. This item repeals the penalty under current subsections 245AD(1) and (2) and substitutes a new penalty.
318. Current section 245AD of the Migration Act creates aggravated offences if a person allows, or continues to allow, another person to work.
319. The current penalty for an offence against subsection 245AD(1) or (2) is five years imprisonment. The amendments replace this penalty with **a new penalty of five years imprisonment, or 900 penalty units, or both.**
320. The notes in subsections 245AD(1) and (2) have been amended to appear above the penalty. The note continues to direct the reader to current section 245AH of the Migration Act in relation to when a person will be ***exploited***, within the meaning given by that section.
321. This penalty must be read with subsection 4B(2) of the Crimes Act.

322. Under current subsections 245AD(1) and (2), the maximum pecuniary penalty available on conviction for an offence against either subsection, as calculated under subsection 4B(2) of the Crimes Act, would be 300 penalty units.
323. The maximum pecuniary penalty of 900 penalty units under the new penalties under each subsection is set substantially higher than the standard penalty unit/imprisonment ratio provided for in section 4B of the Crimes Act. Given the nature of the conduct covered by section 245AD, the pecuniary penalty is appropriate and necessary to deter any potential unlawful gains from committing the offence. This amendment is intended to send a clear signal that offences against section 245AD as amended are viewed seriously, and that an offence against section 245AD warrants a significant penalty.

Item 20 Subsection 245AE(3)

324. This item repeals the offence provision at current subsection 245AE(3) of the Migration Act, and substitutes a new offence provision and penalty, as new subsection 245AE(3).
325. Current section 245AE of the Migration Act deals with referring an unlawful non-citizen for work. The maximum penalty for an offence under current subsection 245AE(3) is 2 years imprisonment.
326. New subsection 245AE(3) is equivalent in effect to current subsection 245AE(3), aside from the penalty. The penalty under new subsection 245AE(3) provides that the new maximum penalty for an offence under new subsection 245AE(3) is imprisonment for 2 years, or 360 penalty units, or both.
327. This penalty must also be read with subsection 4B(2) of the Crimes Act.
328. Under current subsection 245AE(3), the maximum pecuniary penalty available on conviction for an offence against subsection 245AE(1), as calculated under subsection 4B(2) of the Crimes Act, would be 120 penalty units.
329. The maximum pecuniary penalty of 360 penalty units under new subsection 245AE(3) is set substantially higher than the standard penalty unit/imprisonment ratio provided for in section 4B of the Crimes Act. Given the nature of the conduct covered by section 245AE, it is appropriate that the pecuniary penalty available for the offence is set at the same amount as for current section 245AR, particularly where a lower pecuniary penalty may be perceived as able to be offset against the potential unlawful gains from committing the offence. This amendment is intended to send a clear signal that offences against section 245AE as amended are viewed seriously, and that an offence against section 245AE warrants a significant penalty.

330. The note to new subsection 245AE(3) advises that in accordance with subsection 13.3(3) of the Criminal Code, a defendant bears the evidential burden in relation to proving the matter in subsection 245AE(2). Current subsection 13.3(6) of the Criminal Code provides an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This remains appropriate as the matters that compromise the defence are peculiarly within the knowledge of the defendant as they relate to actions taken by the defendant to verify certain matters. It would be more difficult and costly for the prosecution to have to prove these matters due to the nature and possession of the evidence required to establish these matters.

Item 21 Subsection 245AE(5)

331. This item repeals the civil penalty provision at current subsection 245AE(5) of the Migration Act and substitutes a new civil penalty provision as new subsection 245AE(5).
332. Current section 245AE of the Migration Act deals with referring an unlawful non-citizen for work. The maximum civil penalty for contravention of that provision is 90 penalty units.
333. New subsection 245AE(5) is equivalent in effect to current subsection 245AE(5), aside from the penalty. Under new subsection 245AE(5), the maximum civil penalty for which a person is liable if the person contravenes current subsection 245AE(1) is 240 penalty units.
334. The note to new subsection 245AE(5) provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order and refers the reader to section 486ZF of the Migration Act.

Item 22 Subsection 245AEA(3)

335. This item repeals the offence provision at current subsection 245AEA(3) of the Migration Act and substitutes a new offence provision as new subsection 245AEA(3).
336. Current section 245AEA deals with referring a lawful non-citizen for work in breach of a ***work-related condition***. The maximum penalty for an offence under current subsection 245AEA(3) is 2 years imprisonment.
337. New subsection 245AEA(3) is equivalent in effect to current subsection 245AE(3), aside from the penalty. The penalty under new subsection 245AEA(3) provides that the new maximum penalty for an offence under new subsection 245AEA(3) is 2 years imprisonment, or 360 penalty units, or both.
338. This penalty must be read with subsection 4B(2) of the Crimes Act.
339. Under current subsection 245AEA(3), the maximum pecuniary penalty available on conviction for an offence against subsection 245AEA(1), as calculated under subsection 4B(2) of the Crimes Act, would be 120 penalty units.

340. The maximum pecuniary penalty of 360 penalty units under new subsection 245AEA(3) is set substantially higher than the standard penalty unit/imprisonment ratio provided for in section 4B of the Crimes Act. Given the nature of the conduct covered by section 245AE, it is appropriate that the pecuniary penalty available for the offence is set at the same amount as for current section 245AR, particularly where a lower pecuniary penalty may be perceived as able to be offset against the potential unlawful gains from committing the offence. This amendment is intended to send a clear signal that offences against section 245AEA as amended are viewed seriously, and that an offence against section 245AEA warrants a significant penalty.
341. The note to new subsection 245AEA(3) advises that in accordance with subsection 13.3(3) of the Criminal Code, a defendant bears the evidential burden in relation to proving the matter in subsection 245AEA(2). Current subsection 13.3(6) of the Criminal Code provides an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This remains appropriate as the matters that compromise the defence are peculiarly within the knowledge of the defendant as they relate to actions taken by the defendant to verify certain matters. It would be more difficult and costly for the prosecution to have to prove these matters due to the nature and possession of the evidence required to establish these matters.

Item 23 Subsection 245AEA(5)

342. This item repeals the civil penalty provision in current subsection 245AEA(5) of the Migration Act and substitutes a new civil penalty provision, in new subsection 245AEA(5).
343. Current section 245AEA deals with referring a lawful non-citizen for work in breach of a ***work-related condition***. Under new subsection 245AEA(5), the maximum civil penalty for which a person is liable if the person contravenes current subsection 245AEA(1) is 240 penalty units, an increase from 90 penalty units.
344. The note to new subsection 245AEA(5) provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order and refers the reader to section 486ZF of the Migration Act.

Item 24 Subsections 245AEB(1) and (2) (penalty and note)

345. This item repeals the current penalty in current subsections 245AEB(1) and (2), and substitutes a **new penalty that provides for a sentence of up to five years' imprisonment, or 900 penalty units, or both.**
346. The notes in subsections 245AEB(1) and (2) have also been amended to appear above the penalty. The note continues to direct the reader to current section 245AH of the Migration Act in relation to when a person will be ***exploited***, within the meaning given by that section.
347. Current subsections 245AEB(1) and (2) of the Migration Act provide for aggravated offences if a person refers another person to a third person for work. If a person is convicted for an offence against either of these subsections, the current penalty is five years' imprisonment.

348. This penalty must be read with subsection 4B(2) of the Crimes Act.
349. In relation to current subsections 245AEB(1) and (2), the maximum pecuniary penalty as calculated under subsection 4B(2) of the Crimes Act would be 300 penalty units.
350. The maximum pecuniary penalty of 900 penalty units under the new penalties under each subsection is set substantially higher than the standard penalty unit/imprisonment ratio provided for in section 4B of the Crimes Act. Given the nature of the conduct covered by section 245AEB, **the pecuniary penalty is appropriate and necessary to deter any potential unlawful gains from committing the offence.** This amendment is intended to send **a clear signal that offences against section 245AEB as amended are viewed seriously,** and that an offence against section 245AEB warrants a significant penalty.

Item 25 Subsection 245AK(2)

351. This item repeals the civil penalty provision in current subsection 245AK(2) and substitutes a new civil penalty provision in new subsection 245AK(2).
352. Current subsection 245AK(2) provides that that an executive officer of a body corporate is liable to a civil penalty if the officer contravenes subsection 245AK(1). The maximum civil penalty is currently 90 penalty units. The penalty has been increased to 240 penalty units.
353. The note to new subsection 245AE(5) provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order and refers the reader to section 486ZF of the Migration Act.

Part 4 Enforceable undertakings for work-related breaches

Migration Act 1958

Item 26 After section 245AL

354. This item inserts new section 245ALA after current section 245AL of the Migration Act.
355. New section 245ALA sets out the triggering provisions of the standard enforceable undertakings powers available under Part 6 of the Regulatory Powers Act, and makes these powers available in relation to the ***work-related offences*** and ***work-related provisions*** of the Migration Act.

Enforceable undertakings under Part 6 of the Regulatory Powers Act

356. The Regulatory Powers Act provides for a standard suite of provisions that can be triggered by other Acts in relation to monitoring and investigation powers, as well as civil penalties, infringement notices, enforceable undertakings and injunctions. The standard provisions of the Regulatory Powers Act are an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, providing adequate safeguards and protecting important common law privileges.
357. Part 6 of the Regulatory Powers Act creates a standard framework for accepting and enforcing undertakings relating to compliance with provisions of an Act. Subsection 110(2) of the Regulatory Powers Act states that, in order for Part 6 of the Regulatory Powers Act to operate, a provision of an Act or legislative instrument must be made enforceable under Part 6 by a triggering Act.
358. When a triggering Act applies Part 6 of the Regulatory Powers Act, it must identify who is an authorised person and the relevant court or courts that may exercise powers under Part 6 of the Regulatory Powers Act (see sections 112 and 113 of the Regulatory Powers Act). It must also express whether the authorised person may delegate their powers and functions under Part 6 of the Regulatory Powers Act in relation to the enforceable undertakings provisions of the triggering Act. If provisions of the triggering Act are subject to enforceable undertakings and apply in external Territories or offshore areas, the triggering Act should identify whether Part 6 of the Regulatory Powers Act extends to any external Territories.
359. The purpose of these amendments is to enhance the compliance and enforcement framework relating to the ***work-related offences*** and ***work-related provisions*** of the Migration Act. This provides another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings. Enforceable undertakings will provide the necessary flexibility to require a person to take specific action to address the underlying non-compliance issue based on the circumstances of the individual case.
360. For example, an enforceable undertaking could include:

- a commitment by the employer to comply with a specific legislative provision, to undertake checks of prospective non-citizen employees' immigration status and work-related visa conditions via the Visa Entitlement Verification Online system;
- an undertaking by the employer to refrain from allowing non-citizens to work in breach of the work-related conditions of their visa; or
- an agreement by the employer to participate in an education program in relation to compliance with the ***work-related provisions*** of the Migration Act.

New section 245ALA – Enforceable undertakings

361. New section 245ALA sets out the triggering provisions of the standard enforceable undertakings powers available in relation to contraventions of ***work-related offences*** and ***work-related provisions*** under the Migration Act, through the application of Part 6 of the Regulatory Powers Act. Part 6 of the Regulatory Powers Act, as applied by new section 245ALA, provides the Migration Act with a framework for accepting and enforcing undertakings relating to compliance with ***work-related offences*** and ***work-related provisions*** under the Migration Act.
362. Subsection 114(1) of Part 6 of the Regulatory Powers Act provides that an authorised person may accept any of the following undertakings:
- a written undertaking given by a person that the person will, in order to comply with a provision enforceable under Part 6, take specified action;
 - a written undertaking given by a person that the person will, in order to comply with a provision enforceable under Part 6, refrain from taking specified action;
 - a written undertaking given by a person that the person will take specified action directed towards ensuring that the person does not contravene a provision enforceable under Part 6, or is unlikely to contravene such a provision, in the future.

Enforceable provisions

363. New subsection 245ALA(1) provides that a provision is enforceable under Part 6 of the Regulatory Powers Act if it is a ***work-related offence*** or a ***work-related provision***. These terms are being inserted into subsection 5(1) of the Migration Act by this Bill.
364. Subsection 110(2) of the Regulatory Powers Act provides that, for Part 6 of the Regulatory Powers Act to operate, a provision of an Act or a legislative instrument must be made enforceable under Part 6 by the triggering Act. Section 111 of the Regulatory Powers Act also relevantly provides that a provision of an Act or a legislative instrument is ***enforceable*** under Part 6 if an Act provides that the provision is enforceable under this Part. New subsection 245ALA(1) has the effect of making the ***work-related offences*** and ***work-related provisions*** of the Migration Act ***enforceable*** within the meaning of section 111 of the Regulatory Powers Act.

365. A note at the foot of new subsection 245ALA(1) explains that Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions. This note is intended to assist readers and draw their attention to Part 6 of the Regulatory Powers Act, which provides the substantive framework for accepting and enforcing undertakings in relation to ***work-related offences*** and ***work-related provisions***. Subsection 245ALA(1) and the other provisions in new section 245ALA are the triggering provisions necessary to apply this framework in relation to the ***work-related offences*** and ***work-related provisions*** of the Migration Act.

Authorised person

366. Section 112 of the Regulatory Powers Act provides that if a triggering Act provides that a person is an authorised person in relation to that provision for the purposes of Part 6 of the Regulatory Powers Act, that person is an ***authorised person*** for the purposes of exercising powers under Part 6 in relation to an enforceable provision.
367. New subsection 245ALA(2) provides that for the purposes of Part 6 of the Regulatory Powers Act, the Minister is an authorised person in relation to the ***work-related offences*** and ***work-related provisions*** of the Migration Act (as made ***enforceable*** under Part 6 of the Regulatory Powers Act by new subsection 245ALA(1)).
368. New subsection 245ALA(3) provides that the Minister may delegate the Minister's powers and functions under Part 6 of the Regulatory Powers Act to an authorised officer, in relation to the provisions mentioned in subsection 245ALA(1). The delegation must be in writing.
369. Subsection 5(1) of the Migration Act provides that the expression ***authorised officer***, when used in a provision of the Migration Act, means an officer authorised in writing by the Minister, the Secretary of the Department or the Australian Border Force Commissioner for the purposes of that provision.
370. New subsection 245ALA(4) provides that the Minister may delegate a power or function under subsection 245ALA(3) only if the Minister is satisfied that the ***authorised officer*** has appropriate qualifications, training or experience to exercise the power or perform the function. This provision has the effect of limiting the general delegation power in subsection 245ALA(3), ensuring that matters relevant to the experience, qualifications and training of an ***authorised officer*** must be taken into account when the Minister exercises the delegation power in subsection 245ALA(3).

371. In general, the delegation of the Minister's powers and functions under Part 6 of the Regulatory Powers Act in relation to ***work-related offences*** and ***work-related provisions*** will be confined to members of the Department's SES, or ABF officers at Commander level or higher. While new subsection 245ALA(3) does not expressly include this limitation, this is appropriate in order to provide sufficient flexibility to allow for the Minister to delegate the Minister's powers and functions to certain ***authorised officers*** below these levels from time to time – but only where the Minister is satisfied, as required by new subsection 245ALA(4), that that ***authorised officer*** has the appropriate qualifications, training or experience to exercise the power or perform the function.
372. The combined effect of subsections 245ALA(3) and (4) ensures there is appropriate flexibility in the legislation to accommodate future structural changes in the Department and ABF, where certain functions might be assigned to appropriately qualified, experienced ***authorised officers*** at management levels below SES or Commander. It is foreseeable, for example, that responsibility for enforceable undertakings might be appropriately assigned to a superintendent in the ABF who has also been delegated other functions and powers as the ***authorised officer*** centrally responsible for ABF operations relating to compliance with the ***work-related offences*** and ***work-related provisions*** of the Migration Act.
373. New subsection 245ALA(5) provides that an authorised officer exercising powers or performing functions under a delegation under subsection 245ALA(3) must comply with any directions of the Minister.

Relevant court

374. New subsection 245ALA(6) provides that, for the purposes of Part 6 of the Regulatory Powers Act, an ***eligible court*** is a relevant court in relation to the provisions mentioned in subsection 245ALA(1) – that is, the ***work-related offences*** and ***work-related provisions*** of the Migration Act.
375. Subsection 5(1) of the Migration Act provides that ***eligible court*** means:
- the Federal Court; or
 - the Federal Circuit and Family Court of Australia (Division 2); or
 - a District, County or Local Court; or
 - a Magistrates Court; or
 - any other State or Territory court that is prescribed by the regulations.
376. Section 113 of the Regulatory Powers Act states that a relevant court can exercise powers under Part 6 of the Regulatory Powers Act concerning enforceable undertakings, provided that an Act designates the court as a relevant court. In other words, the court must be designated by an Act as relevant to the provision that Part 6 seeks to enforce in order to exercise powers under Part 6 in relation to an undertaking given in relation to that provision.

377. The purpose of new subsection 245ALA(6) is to provide that an *eligible court* within the meaning of subsection 5(1) of the Migration Act is a *relevant court* for the purposes of exercising the powers in Part 6 of the Regulatory Powers Act, in relation to an undertaking given in relation to any of the *work-related offences* and *work-related provisions* of the Migration Act.

Enforceable undertaking may be published on the internet

378. New subsection 245ALA(7) provides the Minister the discretion to publish an enforceable undertaking that a person has given, in relation to a *work-related offence* or *work-related provision*, on the Department's website. As the undertaking would have been given in circumstances where the person has contravened one or more of the relevant offence or civil penalty provisions, the publication of the undertaking draws public attention to that contravention, and is intended to deter the person from breaching undertakings in future.
379. Publication of an enforceable undertaking provides transparency to the Australian community, demonstrating that the Minister is taking action against employers and third parties who do not comply with obligations under the Migration Act, or otherwise act in contravention of *work-related offences* and *work-related provisions*. Publication also serves as a general deterrent by publicising these provisions and related obligations, and what action may be taken for contravention of these provisions.

Extension to external Territories

380. New subsection 245ALA(8) provides that Part 6 of the Regulatory Powers Act, as applied by section 245ALA in relation to *work-related offences* and *work-related provisions*, extends to a Territory to which the Migration Act extends.
381. A note at the foot of this subsection directs the reader to section 7 of the Migration Act. Subsection 7(2) relevantly provides that the Migration Act extend to a *prescribed Territory*. Subsection 7(1) provides that *prescribed territory* means Norfolk Island, the Coral Sea Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands.
382. The purpose of this provision is to make clear that the provisions in Part 6 of the Regulatory Powers Act extend to the prescribed Territories within the meaning of section 7 of the Migration Act.

Relationship with civil penalty orders

383. New subsection 245ALA(9) sets out the relationship between enforceable undertakings and civil penalty orders. This subsection provides that while an enforceable undertaking under subsection 245ALA(1) remains on foot and has not been withdrawn, the Minister must not apply for a civil penalty order under current subsection 486R(1) of the Migration Act in relation to the same contravention of a *work-related provision* by the person.

384. This restriction ensures the Minister cannot pursue multiple enforcement mechanisms in relation to the same contravention concurrently. It does not preclude the Minister from taking action under section 115 of the Regulatory Powers Act by applying to a *relevant court* for an order in relation to a breach of the enforceable undertaking by the person who gave it.
385. Part 6 of the Regulatory Powers Act enables an authorised person to accept written undertakings committing a person to particular action (or inaction) in order to prevent or respond to a breach of an enforceable provision. Undertakings are enforceable in their own right (see section 111 of the Regulatory Powers Act), and they may be entered into instead of, or in addition to, the authorised person taking other disciplinary action.
386. Undertakings provide a remedy other than financial sanctions to past or prospective breaches of a provision.
387. Section 115 enables the authorised person to apply to have undertakings given under section 114 enforced in a *relevant court*. This clause lists the orders a court can impose to remedy a breach of an undertaking, including orders to comply with the undertaking, to pay a pecuniary penalty to the Commonwealth, to compensate other people, or any other order the court sees fit.

Item 27 Application of amendments

388. This item provides for the application of the enforceable undertakings provisions of Part 6 of the Regulatory Powers Act, as that Part applies under new section 245ALA of the Migration Act, in relation to *work-related offences* and *work-related provisions*. The amendment clarifies that Part 6 of the Regulatory Powers Act applies in relation to undertakings given on or after the commencement of the Schedule to the Bill.

Part 5 **Compliance notices for work-related breaches**

Division 1 **Amendments**

Migration Act 1958

Item 28 **At the end of subsection 140K(1)**

Item 29 **At the end of subsection 140K(2)**

389. Current section 140K of the Migration Act deals with sanctions for failing to satisfy sponsorship obligations. Current subsection 140K(1) sets out the actions that may be taken in relation to approved sponsors. Current subsection 140K(2) sets out the actions that may be taken in relation to former approved sponsors.
390. New paragraph 140K(1)(d) adds an additional enforcement tool to these available actions by providing that an authorised officer may give the approved sponsor a compliance notice under new section 140RB.
391. New paragraph 140K(2)(d) adds an additional enforcement tool to these available actions by providing that an authorised officer may give the approved sponsor a compliance notice under new section 140RB.

Item 30 **After subsection 140RA(3)**

392. Current section 140RA sets out the framework for the administration of enforceable undertakings as they relate to sponsorship obligations under current section 140H (*Sponsorship obligations—general*).
393. New subsection 140RA(3A) provides that the relevant authorised person under subsection 140RA(1) must not accept an undertaking from an approved sponsor or a former approved sponsor in relation to a sponsorship obligation if that individual has been given a notice under new section 140RB in relation to a contravention relating to the sponsorship obligation.

Item 31 **At the end of Subdivision D of Division 3A of Part 2**

394. This item adds new section 140RB at the end of Subdivision D of Division 3A of Part 2.
395. New section 140RB provides the requirements for compliance notices issued in relation to contraventions of current subsections 140Q(1) or (2) (failing to satisfy sponsorship obligations).
396. New subsection 140RB(1) sets out the scope of the provision and provides that the section applies if an authorised officer reasonably believes that a person who is or was an approved work sponsor has contravened subsection 140Q(1) or (2).

397. The authorised officer needs only to hold a reasonable belief that the person has engaged in or is engaging in conduct which would contravene current subsection 140Q(1) or (2). The authorised officer is not required to consider what the person's state of mind was, or is, when engaging in the relevant conduct. The authorised officer is also not required to consider any associated defences.

Giving a compliance notice

398. New subsection 140RB(2) provides that an authorised officer may give the person a compliance notice specifying action that the person must take, or refrain from taking, to address the contravention of subsection 140Q(1) or (2) (as applicable), within the time specified in the notice.

399. Compliance notices will provide the necessary flexibility to require a person to take specific action to address the underlying non-compliance issue, based on the circumstances of the individual case.

400. A note at the foot of new subsection 140RB(2) clarifies that a compliance notice can also be varied or withdrawn under subsection 33(3) of the Acts Interpretation Act.

401. New subsection 140RB(3) provides that the compliance notice may require the person to produce reasonable evidence of compliance with the notice.

402. New subsection 140RB(4) provides the information that must be included in a compliance notice, being:

- the name of the person;
- the name of the authorised officer;
- a summary of the contravention;
- an explanation that a failure to comply with the notice may contravene a civil penalty provision; and
- any other prescribed matters.

Person must comply with compliance notice

403. New subsection 140RB(5) provides that a person who is given a compliance notice must comply with it.

404. A person who contravenes this subsection is liable to a civil penalty of 48 penalty units.

405. Current section 486ZF of the Migration Act provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order. The note under new subsection 140RB(5) draws the reader's attention to this provision.

Effect of compliance with compliance notice

406. New subsection 140RB(6) provides that a person who complies with a notice is not taken to have admitted to the contravention in relation to which the notice is given.

Relationship with enforceable undertakings

407. New subsection 140RB(7) provides that an authorised officer must not give a person a compliance notice in relation to a contravention relating to a sponsorship obligation if:

- the person has given an undertaking under section 140RA in relation to that sponsorship obligation; and
- the undertaking has not been withdrawn.

408. The effect of this subsection is that while an enforceable undertaking under section 140RA remains on foot and has not been withdrawn, the authorised officer must not give a person a compliance notice in relation to the same contravention of a sponsorship obligation by the person.

Relationship with civil penalty provisions

409. New subsection 140RB(8) prevents the Minister from instituting proceedings under current subsection 486R(1) of the Migration Act in relation to a contravention of subsection 140Q(1) or (2) by a person if:

- if an authorised officer has already given the person a notice in relation to the contravention and either:
 - the notice has not been withdrawn, and the person has complied with the notice; or
 - the person has applied to a court for judicial review of the decision to give the notice, and that application has not been completely dealt with.

Item 32 After paragraph 140X(a)

410. This item inserts new paragraph 140X(aaa) after current paragraph 140X(a).
411. Current section 140X deals with when the powers of an inspector under this Subdivision may be exercised.
412. New paragraph 140X(aaa) has the effect of providing another instance of when the powers of an inspector may be exercised – for the purpose of investigating whether another person who is or was an approved work sponsor has contravened new subsection 140RB(5).

Item 33 In the appropriate position in Division 12 of Part 2

413. This item inserts new Subdivision F—Compliance notices for work-related breaches.

414. New item 245AYP deals with compliance notices.
415. New subsection 245AYP(1) provides that section applies if an authorised officer reasonably believes that a person has contravened a conduct rule provision (within the meaning of subsection 245AL(1) or 245AYO(1)).
416. The authorised officer needs only to be satisfied that the person has engaged in, or is engaging in, the relevant conduct. The authorised officer is not required to consider what the person's state of mind was, or is, when engaging in the relevant conduct. The authorised officer is also not required to consider any associated defences.

Giving a compliance notice

417. New subsection 245AYP(2) provides that the authorised officer may give the person a notice (a **compliance notice**) specifying action that the person must, within such reasonable time as is specified in the notice, take or refrain from taking to address the contravention.
418. A note immediately below this subsection clarifies that a compliance notice given under new subsection 245AYP(2) can be varied or withdrawn under subsection 33(3) of the Acts Interpretation Act.
419. New subsection 245AYP(3) provides that the compliance notice may require the person to produce reasonable evidence of compliance with the notice.
420. New subsection 245AYP(4) sets out the requirements for the information that must be included in a compliance notice, being:
- the name of the person to whom the notice is given;
 - the name of the authorised officer giving the notice;
 - a summary of the contravention;
 - an explanation that a failure to comply with the notice may contravene a civil penalty provision; and
 - any other prescribed matters.

Person must comply with notice

421. New subsection 245AYP(5) provides that a person who is given a compliance notice must comply with it.
422. A person who contravenes this subsection is liable to a civil penalty of 48 penalty units.
423. Current section 486ZF of the Migration Act provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order. The note under new subsection 245AYP(5) draws the reader's attention to this provision.

Effect of compliance with compliance notice

424. New subsection 245AYP(6) provides that a person who complies with a notice is not taken to have admitted to the contravention in relation to which the notice is given.

Relationship with enforceable undertakings

425. New subsection 245AYP(7) provides that an authorised officer must not give a person a compliance notice in relation to a contravention if:

- the person has given an undertaking under new section 245ALA in relation to that sponsorship obligation; and
- the undertaking has not been withdrawn.

426. The effect of this subsection is that while an enforceable undertaking under new section 245ALA remains on foot and has not been withdrawn, the authorised officer must not give a person a compliance notice in relation to the same contravention by the person.

Relationship with civil penalty provisions

427. New subsection 245AYP(8) prevents the Minister from instituting proceedings under current subsection 486R(1) of the Migration Act in relation to a contravention of subsection 140Q(1) or (2) by a person if:

- if an authorised officer has already given the person a notice in relation to the contravention and either:
 - the notice has not been withdrawn, and the person has complied with the notice; or
 - the person has applied to a court for judicial review of the decision to give the notice, and that application has not been completely dealt with.

Item 34 Subsection 474(4) (before table item 1)

428. This item inserts new item 1A (section 140RB) in the table at current subsection 474(4) of the Migration Act after current item 1 of the table.

429. Current section 474 of the Migration Act provides that certain decisions under the Migration Act, referred to as ***privative clause decisions***, are final. Subsection 474(4) provides for decisions under a provision that are not privative clause decisions, and which are ***non-privative clause decisions*** by operation of subsection 474(6). Subsection 474(2) of the Migration Act provides that a ***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under the Migration Act or under a regulation or other instrument made under the Migration Act (whether in the exercise of a discretion or not), other than a decision referred to in current subsection 474(4) or (5).

430. The definition of ***non-privative clause decision*** in current subsection 474(6) of the Migration Act is included to support current section 476A, which has the effect of directing matters arising from decisions under provisions in the table under subsection 474(4) to the Federal Circuit and Family Court of Australia (Federal Circuit Court) and not the Federal Court. Subsection 476(3) provides that section 476 does not affect any jurisdiction that the Federal Circuit Court may have in relation to ***non-privative clause decisions*** under section 8 of the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) or section 44AA of the AAT Act. The Federal Circuit Court has jurisdiction under the AD(JR) Act in relation to ***non-privative clause decisions***.

431. The amendment made by this item makes clear that a decision under new section 140RB is not a ***privative clause decision***.

Item 35 Subsection 474(4) (before table item 6)

432. Similarly, this item inserts new item 6A (section 245AYP) in the table at current subsection 474(4) of the Migration Act after current item 6 of the table.

433. Current section 474 of the Migration Act provides that certain decisions under the Migration Act, referred to as ***privative clause decisions***, are final.

434. The amendment made by this item makes clear that a decision under new section 245AYP is not a ***privative clause decision***.

Division 2 Application provision

Item 36 Application of amendments

435. This item provides that the amendments of the Migration Act made by this Part apply in relation to conduct (including an omission) engaged in before, on or after the commencement of this Schedule.

436. The introduction of compliance notices as an additional compliance tool to deal with conduct constituting a work-related offence or a contravention of a work-related provision is intended to provide an alternative to court proceedings, in an effort to encourage greater compliance by employers. Aside from the new work-related offences and civil penalty provisions introduced in this Bill, the work-related offences and work-related provisions in Subdivision C of Division 12 of Part 2 of the Migration Act are long-standing, well-established provisions.

437. There is limited excuse for employers, labour hire intermediaries and other parties involved in the employment of non-citizens to be unaware of these existing provisions. The establishment of the Migrant Workers' Taskforce was preceded by a significant number of high-profile cases revealing exploitation of migrant workers to a concerning level. These cases were highlighted by government investigations, public inquiries and media reports. Among other things, these cases exposed unacceptable gaps in Australia's legal system designed to treat all workers equally, regardless of their visa status.

438. The Taskforce was set the specific task to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify cases of migrant worker exploitation.
439. The introduction of compliance notices as an additional legislative tool under the Migration Act, to deal with non-compliance with work-related provisions under the Migration Act, is consistent with this approach. Compliance notices provide a legislative basis and framework for the ABF to promote compliance by employers, labour hire intermediaries and other persons with the work-related provisions of the Migration Act.
440. The application of the amendments to the Migration Act by this Part to conduct (including an omission) occurring before, on or after the commencement of the Schedule ensures that the ABF has the necessary tools to deal effectively with existing, and in some cases intractable, non-compliance with provisions of the Migration Act that are intended to protect migrant workers, as well as Australia's reputation as a destination of choice.

Part 6 Other amendments

Division 1 Main amendments

Migration Act 1958

Item 37 Subsection 116(1A)

441. This item amends section 116 (*Power to cancel*) of the Migration Act by repealing current subsection 116(1A) and substituting it with new subsections 116(1A) and (1B). This will allow the Governor-General to prescribe matters to which the Minister must, may or must not, have regard in determining whether the Minister is satisfied of certain matters relevant to the cancellation of visas, and to specify the weight to be given to any such matters.

442. For example, this will allow measures such as the Assurance Protocol, which is an administrative arrangement between the FWO and the Department, to be codified in the regulations. Codifying the Assurance Protocol will give additional assurance to migrant workers that they can seek help without fear of visa cancellation, even if they have breached their work-related visa conditions. The terms and conditions of the Assurance Protocol are subject to consultation before they are prescribed under new subsection 116(1A) to ensure they are holistic and robust, while maintaining visa program integrity.

New subsections 116(1A) and (1B)

443. New subsection 116(1A) provides that the regulations may do any one or more of the following:

- prescribe matters to which the Minister must, or must not, have regard in determining whether the Minister is satisfied as mentioned in a paragraph of current subsection 116(1) or (1AC) or current subsection 116(1AA) or (1AB); or
- prescribe matters to which the Minister may have regard in determining whether the Minister is satisfied as mentioned in a paragraph of current subsection 116(1) or (1AC), or current subsection 116(1AA) or (1AB); or
- specify the weight to be given to a matter prescribed under current paragraph 116(1A)(a) or (b).

444. New subsection 116(1B) provides that new subsection 116(1A) does not limit the matters to which the Minister may have regard in determining whether the Minister is satisfied as mentioned in a paragraph of subsection 116(1) or (1AC), or subsection 116(1AA) or (1AB).

Current subsections 116(1A), (1AA), (1AB) and (1AC)

- 445. Current subsection 116(1A) of the Migration Act provides that the regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in current paragraph 116(1)(fa), and that such regulations do not limit the matters to which the Minister may have regard for that purpose.
- 446. Current paragraph 116(1)(fa) provides that the Minister may cancel a student visa if he or she is satisfied that a student visa holder: is not, or likely to not be, a genuine student; or has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa.
- 447. Current subregulations 2.43(1C) and (1D) of the Migration Regulations, which are made under subsection 116(1A) of the Migration Act, will continue to be supported by new subsection 116(1A).
- 448. Current subsection 116(1AA) provides that, subject to subsections 116(2) and (3), the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity.
- 449. Current subsection 116(1AB) provides that, subject to subsections 116(2) and (3), the Minister may cancel a visa if he or she is satisfied of certain matters relating to incorrect information.
- 450. Current subsection 116(1AC) provides that, subject to subsections 116(2) and (3), the Minister may cancel a visa if he or she is satisfied of certain matters relating to the asking, receiving, offering or providing of a benefit in return for the occurrence of a 'sponsorship-related event' as defined in current subsection 245AQ.

Current subsections 116(2) and (3)

- 451. Current subsection 116(2) provides that the Minister is not to cancel a visa under subsection 116(1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.
- 452. Current subsection 116(3) provides that if the Minister may cancel a visa under subsection 116(1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

Item 38 After subsection 140RA(2)

- 453. This item amends current section 140RA (*Enforceable undertakings*) of the Migration Act by inserting new subsections 140RA(2A), (2B) and (2C).

Authorised person

- 454. Current subsection 5(1) of the Migration Act provides that the expression ***authorised officer***, when used in a provision of the Migration Act, means an officer authorised in writing by the Minister, the Secretary of the Department of Home Affairs or the Australian Border Force Commissioner for the purposes of that provision.

455. New subsection 140RA(2A) provides that the Minister may, in writing, delegate the Minister's powers and functions under Part 6 of the Regulatory Powers Act to an authorised officer in relation to the provision mentioned in subsection 140RA(1).
456. New subsection 140RA(2B) provides that the Minister may delegate a power or function under new subsection 140RA(2A) only if the Minister is satisfied that the authorised officer has appropriate qualifications, training or experience to exercise the power or perform the function. Consistent with new subsection 245ALA(4), new subsection 140RA(2B) has the effect of limiting the general delegation power in subsection 140RA(2A), ensuring that matters relating to the experience, qualifications and training of an authorised officer must be taken into account when the Minister exercises the delegation power in subsection 140RA(2A).
457. New subsection 140RA(2C) provides that an authorised officer exercising powers or performing functions under a delegation under new subsection 140RA(2A) must comply with any directions of the Minister.
458. In general, the delegation of the Minister's powers and functions under Part 6 of the Regulatory Powers Act in relation to current section 140H (*Sponsorship obligation—general*), which is an enforceable provision, will be confined to members of the Department's SES, or ABF officers at Commander level or higher. While new subsection 140RA(2A) does not expressly include this limitation, the alternative requirement to consider matters of experience, qualifications and training is appropriate in order to provide necessary flexibility to allow for the Minister to delegate the Minister's powers and functions to certain authorised officers below these levels in certain circumstances – but only where the Minister is satisfied, as required by new subsection 140RA(2B), that the authorised officer has the appropriate qualifications, training or experience to exercise the power or perform the function and will only exercise the delegated powers and perform the functions as directed by the Minister.
459. The combined effect of new subsections 140RA(2A), (2B) and (2C) is to ensure there is appropriate flexibility in the legislation to accommodate future structural changes in the Department and ABF, where certain functions might be assigned to appropriately qualified, experienced authorised officers at management levels below SES or Commander. It is foreseeable, for example, that responsibility for enforceable undertakings might be appropriately assigned to a superintendent in the ABF who has also been delegated other functions and powers as the authorised officer centrally responsible for ABF operations relating to sponsor monitoring and enforcement under Subdivision C of Division 3A of Part 2 of the Migration Act.
460. The purpose of these amendments is to ensure that there is consistency in the Migration Act in relation to the delegation of the Minister's powers and functions under Part 6 of the Regulatory Powers Act, as they relate to amended section 140RA, and new section 245ALA.

Item 39 Section 235

461. This item repeals current section 235 (*Offences in relation to work*) of the Migration Act.

- 462. Current subsection 235(1) of the Migration Act provides that a non-citizen commits a strict liability offence if the temporary visa held by the non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia and the non-citizen contravenes that condition.
- 463. Current subsection 235(3) of the Migration Act provides that an unlawful non-citizen commits a strict liability offence if the unlawful non-citizen performs work in Australia whether for reward or otherwise.
- 464. Current subsection 235(4) of the Migration Act provides that a non-citizen commits a strict liability offence if there is a criminal justice certificate or a criminal justice stay warrant about the non-citizen and the non-citizen does certain work in Australia, whether for reward or otherwise.
- 465. The repeal of current section 235 of the Migration Act is intended to have the principal effect of preventing an employer from arguing that a migrant worker is not entitled to the same workplace protections as other workers in Australia because of their immigration status or right to work, and to encourage increased reporting of employer non-compliance with workplace laws (exploitation). The existence of section 235 has resulted in findings that certain contracts for or of service entered into by migrant workers are void for illegality and thereby enabling some employers to abrogate their obligations to provide safe and fair workplaces. Section 235 has also been cited as a reason temporary migrants refrain from reporting exploitation in the workplace.

Item 40 Subsection 245AA(4)

- 466. This item amends current section 245AA of the Migration Act by repealing subsection 245AA(4).
- 467. Current subsection 245AA(4) of the Migration Act provides that section 235 also contains offences relating to work by an unlawful non-citizen and a non-citizen in breach of a visa condition. The repeal of current subsection 245AA(4) is a consequential amendment necessitated by the repeal of section 235.

Item 41 At the end Subdivision C of Division 12 of Part 2

- 468. This item inserts new section 245APA (*Effect of this Subdivision on the validity of certain contracts is to be disregarded*) into the Migration Act.
- 469. New subsection 245APA(1) provides that, for the purposes of a relevant workplace law, any effect of Subdivision C of Division 12 of Part 2 on the validity of a contract of service, or the validity of a contract for services, is to be disregarded.
- 470. New subsection 245APA(1) is intended to complement the repeal of current section 235 of the Migration Act by preventing an employer from arguing that a migrant worker is not entitled to the same workplace protections as other workers in Australia because of their immigration status or right to work, and to encourage increased reporting of employer non-compliance with workplace laws (exploitation).

471. New subsection 245APA(1) is intended to support migration program integrity only and is not intended to influence the interpretation of other laws. However, new subsection 245APA(1) may affect the application of some laws to non-citizens whose contracts of service, or contracts for services, might have otherwise have been found invalid for illegality because of the provisions in Subdivision C of Division 12 of Part 2 of the Migration Act.

472. New subsection 245APA(2) defines **relevant workplace law** to mean:

- another law of the Commonwealth (other than the Fair Work Act) that regulates the relationships between the parties to a contract of service or a contract for services in relation to the performance of work; or
- a law of a State or Territory that regulates the relationships between the parties to a contract of service or a contract for services in relation to the performance of work;
- and includes a law dealing with occupational health and safety matters and a law dealing with workers' compensation.

473. A signpost to this definition is inserted into current subsection 5(1) of the Migration Act. The term **relevant workplace law** is also used in new section 245AYF and new section 245AYG.

Division 2 Contingent amendment

Migration Act 1958

Item 42 At the end of subsection 245APA(2)

474. This item adds a note at the end of new subsection 245APA(2). The note states:

Section 40B of the *Fair Work Act 2009* also provides that for the purposes of that Act, any effect of this Act, or an instrument made under this Act, on the validity of a contract of employment, or a contract for services, is to be disregarded.

475. The reference to section 40B is a reference to the proposed section to be inserted into the Fair Work Act by item 1 of Schedule 1 to the [Fair Work Legislation Amendment \(Protecting Worker Entitlements\) Bill 2023](#). Proposed new section 40B provides that, for the purposes of the Fair Work Act, any effect of the Migration Act, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded. Proposed new section 40B would ensure that migrant workers working in Australia would be entitled to the benefit of the Fair Work Act regardless of immigration status (*Explanatory Memorandum* to the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023, paragraph 4).

476. This item will commence on the later of immediately after the commencement of the *Migration Amendment (Strengthening Employer Compliance) Act 2023* and immediately after the commencement of Schedule 1 to the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*. However, this item will not commence at all if Schedule 1 to the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* does not commence.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Strengthening Employer Compliance) Bill 2023

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Migration Amendment (Strengthening Employer Compliance) Bill 2023 (the Bill) amends the Migration Act 1958 (the Migration Act) to strengthen the Government's response to the exploitation of migrant workers in Australia by targeting employers and third party providers who misuse visa programs to exploit temporary migrant workers. It also implements Recommendations 19 and 20 from the Report of the Migrant Workers' Taskforce (the Taskforce Report).

At the Jobs and Skills Summit in September 2022, the Government made a commitment to bring forward a package of reforms to address migrant worker exploitation and implement the recommendations of the Taskforce Report – an election commitment.

The Taskforce Report was released in 2019 and is available at:

<https://www.ag.gov.au/industrial-relations/migrant-workers-taskforce>.

The Department of Home Affairs is the lead agency responsible for implementing:

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; and*

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.*

This Bill implements Recommendations 19 and 20, and strengthens existing compliance mechanisms and sanctions available under the Migration Act.

The Bill primarily strengthens the regulatory framework available under the Migration Act for general employers of temporary migrant workers, that is, where the migrant worker's visa has not been sponsored by an employer. This includes, for example, employers of international students, temporary graduate visa holders, working holiday makers, and some bridging visa holders and provisional visa holders. The Bill also increases the penalties available under the Employer Sponsorship Framework in the Migration Act This

Framework regulates the specific obligations of those employers who sponsor the visa of non-citizens for the purpose of filling certain labour gaps.

The Bill strengthens tools to better achieve employer compliance and enhances the protection of temporary migrant workers from unscrupulous employers. The measures also support visa program integrity by addressing the misuse of visa programs, or visa rules, to exploit temporary migrant workers. The national workplace relations system, including the *Fair Work Act 2009* (Fair Work Act) and the *Fair Work Regulations 2009*, remains the primary legislation that establishes a safety net of minimum entitlements and conditions of employment for employees in Australia, regardless of a person's immigration status. The amendments of the Migration Act in this Bill complement existing protections for vulnerable workers in the Fair Work Act.

The Department of Employment and Workplace Relations remains the lead agency responsible for policies that promote fair, productive, flexible and safe workplaces, and the Fair Work Ombudsman continues to lead on compliance and enforcement activities under the Fair Work Act.

The Bill includes five key elements:

- new criminal offences and associated civil penalty provisions for using a person's migration status to exploit them in the workplace;
- a mechanism to prohibit employers that have engaged in deliberate, repeated or serious non-compliance with relevant migration and workplace-related laws, from accessing temporary migrant workers for a period of time;
- increases to the maximum criminal and civil penalties for existing work-related breaches under the Migration Act;
- new compliance tools to better support the Australian Border Force (ABF) to respond proportionately to cases of non-compliance; and
- measures to support the reporting of exploitation, including repeal of section 235 of the Migration Act, which makes it a criminal offence to breach a work-related visa condition, the insertion of an avoidance of doubt clause for remaining work-related offence provisions in the Migration Act to resolve unintended consequences associated with breaches of work-related visa conditions, and the introduction of a power to permit the *Migration Regulations 1994* (the Regulations) to prescribe matters to be taken into account in a decision whether or not to cancel a visa under section 116 of the Migration Act, with the aim of protecting exploited temporary migrant workers from visa cancellation.

These new measures are outlined below.

New offences

The Bill establishes criminal offences and associated civil penalty provisions for a person who coerces or unduly influences or pressures:

- *a lawful non-citizen to work in breach of a work-related visa condition, or*
- *an unlawful non-citizen to accept or agree to a work arrangement to avoid an adverse effect on their continued presence in Australia*
- *a lawful non-citizen to accept or agree to a work arrangement in order to:*
 - *meet a work-related visa requirement, or*
 - *avoid an adverse effect on their status as a lawful non-citizen.*

The first offence relates to coercing or exerting undue influence or pressure on a lawful non-citizen to breach work-related visa conditions. This offence would arise where a person coerces, or exerts undue influence or undue pressure on a lawful non-citizen to accept or agree to a work arrangement that would involve a breach of a work-related condition¹ that applies to that lawful non-citizen's visa.

The second and third offences relate to coercing or exerting undue influence or pressure over a non-citizen to accept exploitative work arrangements by using migration rules. This offence would arise where a person coerces, or exerts undue influence or undue pressure over a non-citizen to accept or agree to a work arrangement in order to avoid an adverse effect on the non-citizen's immigration status (for example, visa cancellation and removal), or that would result in the noncitizen being unable to satisfy a work-related visa requirement.²

The new offences are designed to be applied to an individual and/or business responsible for the offence, as determined through legal proceedings.

The new offences are supplemented by civil penalty provisions. A civil penalty of 240 penalty units may be imposed as an alternative to criminal proceedings.

These offences and the associated civil penalty provisions provide a holistic response to the issues that informed Recommendation 19 of the Taskforce Report.

The overarching aim is to address concerns that employers, labour hire intermediaries or others in the employment chain might use the nature of the migrant's visa status to exploit them in the workplace. The Taskforce Report outlined the reasoning behind Recommendation 19:

¹ A work-related condition is a condition that either prohibits the holder of a visa from working in Australia, or restricts the work that the holder of a visa may do in Australia.

² A work-related visa requirement means a requirement under the Migration Act or the Migration Regulations for a non-citizen to provide information or documents about work the non-citizen has undertaken in Australia. This could be in connection with the visa the non-citizen currently holds, or a future visa application.

“In the case of international students, there have been cases where employers have persuaded students to work longer hours than permitted under their visa restrictions. Underpayment of wages can have this effect if the student needs to earn a certain income. However, some employers have coerced students into accepting lower wages on the threat of referring them to the immigration authorities for breaching their hours’ restriction...”³

The Taskforce Report also noted:

“The three month qualifying period working holiday makers need to meet in order to be able to obtain a second year on their visa is also alleged to have had unintended consequences. It is suggested this has allowed unscrupulous employers to exploit temporary migrant workers. An employer can use the power this restriction provides by rationing work and seeking other benefits before signing off on its completion. Changes to the evidence backpackers can provide to support their claim to have worked the required period are likely to have eased this problem, but concerns are still being raised by backpackers about these issues...”⁴

Media reports also highlighted the need for reform to prevent a person’s migration status being used to exploit them in the workplace. Some of those reports include:

- *Ady moved to Australia for a better life. It took him years to realise his employer was exploiting him*⁵
- *Australia’s largest broccolini farmer was fined for hiring unlawful workers. Now it’s being sued by labourers* By Simone Fox Koob⁶
- *As migration returns to Australia, advocates call for more protections for exploited workers* By Emilia Terzon⁷
- *Half of migrant workers in Australia feel unsafe at work, survey finds* By Stephanie Convey⁸
- *‘No end to this’: six visas, six migration agents, four jobs in regional Australia and still no permanent residency* By Aaron Smith⁹

³ Taskforce Report p. 122

⁴ Ibid p. 122

⁵ Published 5 December 2022: <https://www.sbs.com.au/news/article/ady-moved-to-australia-for-a-better-life-it-took-him-years-to-realise-his-employer-was-exploiting-him/4k8y1d6hq>

⁶ Published 21 February 2023: <https://www.smh.com.au/business/workplace/australia-s-largest-broccolini-farmer-was-fined-for-hiring-unlawful-workers-now-it-s-being-sued-by-labourers-20230220-p5clw0.html>

⁷ Published 1 March 2023: <https://www.abc.net.au/news/2023-03-01/wage-theft-migrant-exploitation-visa-immigration-policy/102025028>

⁸ Published 20 March 2023: <https://www.theguardian.com/australia-news/2023/mar/20/half-of-migrant-workers-in-australia-feel-unsafe-at-work-survey-finds>

⁹ Published 3 April 2023: <https://www.theguardian.com/australia-news/2023/apr/03/no-end-to-this-six-visas-six-migration-agents-four-jobs-in-regional-australia-and-still-no-permanent-residency>

In drafting the new offences, there was consideration of existing legislative provisions that create offences of coercion, undue influence and undue pressure, and a recognition that there were limitations and gaps in the existing provisions. For example:

- The Migration Act includes provisions to sanction a person for allowing (section 245AC) or referring (section 245AEA) a non-citizen to work in breach of a condition of their visa. However, these provisions do not specifically address the issue of an employer or other person unduly influencing, pressuring or coercing the non-citizen to do so. The existing provisions also fail to address the behaviour of unscrupulous employers who might use other provisions in the Migration Act, such as work related visa requirements (for example, the requirement for working holiday maker visa holders to engage in ‘specified work’ in order to meet the requirements for a second or third visa), to exploit a non-citizen employee.
- The Fair Work Act includes provisions that prohibit undue influence (section 344) and coercion (section 343). However, those provisions do not specifically address the issue of employers using the threat of an adverse effect on a person’s immigration status to exploit migrant workers.
- The *Criminal Code Act 1995* (Criminal Code) also has provisions to address the issue of ‘coercion’; however, it sets a higher standard than that which may be covered by ‘influence or pressure’. Based on stakeholder consultation, it was agreed that there may be aggravated cases that warrant the pursuit of a penalty (criminal or civil, depending on the circumstances of the case) that do not fall within the current remit of the Criminal Code.
- The Criminal Code also includes an offence (section 11.4) for a person to urge the commission of an offence (i.e. incitement). However, the rules and penalties around incitement mean that it is considered a lesser offence. The aim of this new offence is to penalise the act of coercion, influence or pressure, not the migrant worker, so section 11.4 is unlikely to adequately address the issue.

The proposed offences seek to address these gaps.

Prohibition on certain employers allowing additional non-citizens to begin work

The Bill establishes a mechanism to prohibit an employer from allowing, for a specified period, any additional temporary migrant workers to work, if the employer is subject to a ‘migrant worker sanction’ because:

- *the employer is convicted of a work-related offence against the Migration Act*
- *a court makes an order against the employer in relation to the treatment of a migrant worker in contravention of:*
 - *a work-related provision in the Migration Act, or*
 - *a specified provision under the Fair Work Act, including a failure to comply with a compliance notice issued for alleged contraventions of certain provisions, or*
 - *an offence relating to slavery, slavery-like practices or trafficking in persons under Division 270 or 271 of the Criminal Code, or*
 - *a relevant offence or civil penalty provision prescribed by the regulations.*
- *the employer has been barred from sponsoring migrant workers through the Migration Act’s Employer Sponsorship Framework*
- *the employer has failed to comply with a compliance notice issued under the Fair Work Act for alleged contraventions of certain provisions or failed to comply with the terms of an enforceable undertaking reached with the Fair Work Ombudsman under the Fair Work Act*

The measures in the Bill that support the prohibition include:

- a defined set of circumstances that trigger the consideration of whether to declare a person to be a prohibited employer, namely where the employer is subject to a *migrant worker sanction* as defined in new sections 245AYE-245AYJ
- a process that allows the employer to show cause as to why they should not be prohibited from employing additional temporary migrant workers
- a requirement to publish information about the prohibited employer
- additional reporting requirements for the employer for 12 months following the prohibition
- review rights
- consequences for failing to comply with the prohibition.

Circumstances that trigger consideration of the prohibition:

The circumstances in which the Minister or the Minister’s delegate may declare an employer to be a ‘prohibited employer’ under this new mechanism are set at a high threshold. They involve the highest-level sanction available under the Employer Sponsor Framework, an adverse outcome from court proceedings, a failure to comply with notices issued by the Fair Work Ombudsman or failing to comply with an agreement entered into with the Fair Work Ombudsman to rectify non-compliance with the Fair Work Act.

The circumstances that trigger consideration of the prohibition are aimed at employers with a history of deliberate, repeated or serious non-compliance with relevant laws and obligations in their treatment of migrant workers. It aims to target employers that have a disregard of their employment obligations and the law, as well as deter those who are considering exploiting temporary migrant workers as a means of sourcing an artificially cheap workforce.

Examples where the prohibition might apply include:

- an employer who breaches the Employer Sponsorship Framework for failing to provide terms and conditions that are equivalent to an Australian worker in the same position (i.e. the market rate, as required under Sponsorship Obligations)
- an employer who is found to have coerced a non-citizen by using migration rules (one of the new offences in response to recommendation 19 of the Taskforce Report)
- an employer who requires a migrant worker to give some of their pay back to the employer (or another person), where this behaviour results in the employer being subject to a court order under the relevant provision of the Fair Work Act
- an employer who is found to have deceptively recruited a non-citizen for labour or services.

The Bill also makes provision for a prohibition to be considered in relation to a relevant offence or civil penalty provision that would be prescribed by the regulations. The inclusion of this mechanism is to allow the prohibition framework to be adaptive to potential future provisions in legislation, such as the Fair Work Act, that protect some of the most vulnerable in society. This mechanism ensures the Government can be responsive to new issues relevant to workplace exploitation as they manifest.

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

It is a privilege to be able to sponsor a worker to come to Australia. For migrant workers, relocating to a new country brings with it a range of inherent risks and opportunities. Through their relocation, migrant workers move away from their support networks, and they may need to adapt to a new language and regulatory environment, unfamiliar laws, rights and obligations. When employers sponsor migrant workers to come to Australia, they have an obligation to provide appropriate supports for that migrant worker and to fulfil their workplace obligations. Where employers have been found to have engaged in serious, deliberate or repeated non-compliance, they should be excluded from the opportunity to employ additional migrant workers, whether sponsored or not sponsored, for a specified period.

The aim of the prohibition is to protect temporary migrant workers from unscrupulous employers. It also seeks to deter unscrupulous employers from engaging in deliberate, repeated or serious forms of non-compliance with relevant laws and obligations. Employers and third party providers who have been found to have misused Australia’s migration program, and engaged in serious breaches of their obligations when employing

temporary migrant workers, will be prevented from being able to use the migration program to fill labour needs for a specified period. In doing so, the new provision builds on the existing 'bar' available under the Employer Sponsorship Framework.

Show cause processes

The Bill provides that before the Minister, or delegate, declares a person to be a prohibited employer, the Minister must give the person a written notice:

- stating that the Minister proposes to make such a declaration, and giving the reasons for it, and
- inviting the person to make a written submission to the Minister, setting out reasons why the Minister should not make the declaration.

This gives the employer an opportunity to respond to the notice and outline any extenuating circumstances to be considered as part of that decision making process.

The employer will be given a minimum of 28 days to respond to the Minister.

The Minister must consider any written submission made by the person that is received by the Minister within the time provided. The Minister must also consider any criteria prescribed by regulations made for the purposes of this provision.

The criteria to be considered by the Minister when deciding whether to make a declaration will be prescribed by the Regulations and may include consideration of:

- past and present conduct of the employer in their engagement with relevant government agencies
- the employer's history of non-compliance and whether the non-compliance is recurring
- the nature and seriousness of the contravention(s) that gave rise to the consideration of a prohibition
- the impact on the migrant worker
- any extenuating circumstances outlined by the employer, including the impact the prohibition would have on the ongoing viability of the business and how that might impact existing workers and the broader community.

Requirement to publish

The Minister will be required to publish the details of prohibited employers on the Department's website, subject to some exceptions that may be provided in the Regulations.

The publication of information relating to prohibited employers provides transparency to existing and prospective migrant workers and the Australian community generally. It visibly demonstrates that the Minister will take action to protect vulnerable migrant workers from unscrupulous employment practices. It will also act as a deterrent to other employers.

The details included on the website will be limited to those details necessary to support the prohibition, including:

- details relating to the prohibited employer,
- the contravention(s) that gave rise to the prohibition, and
- the period during which the person is a prohibited employer (as determined by the Minister depending on the circumstances of the case).

Much of the information to be published will have already been publicly available through the publication of court findings, or entries on the ABF Register of Sanctioned Employers. Where the information is not already publicly available, such as in circumstances of non-compliance with a compliance notice, the limited details listed above will be published for transparency, for the awareness of temporary migrant workers and to act as a deterrent to other employers.

The Department commissioned a Privacy Impact Assessment to support this publication process to ensure privacy concerns are addressed. Procedures will be considered carefully to adhere to the recommendations of that assessment. As recommended, the Department's website will contain an explanation of the framework relating to the Ministerial prohibition and publication processes, as well as the existence of review processes.

Additional reporting obligations

When an employer's prohibited employer status ends, that employer will be subject to certain additional reporting requirements for a period of 12 months.

During that 12-month period, the employer will be required to give the Department certain information in relation to any new temporary migrant employees, including:

- the name of the temporary migrant worker,
- a description of the work for which the non-citizen is employed,
- if the non-citizen holds a visa that is subject to a work-related condition, the details of the condition and a statement that the non-citizen will not be in breach of that condition solely because of doing that work, and
- any other information prescribed by the Regulations.

The aim of the additional reporting requirements is to ensure the employer is aware of and compliant with their obligations.

Review rights

The Bill provides for merits review by the Administrative Appeals Tribunal of the decision to declare a person to be a prohibited employer.

Consequences for failing to comply

Contravention of the prohibition is a criminal offence with a penalty of up to 2 years imprisonment or 360 penalty units or both, or a civil penalty of 240 penalty units.

The consequence of non-compliance with the additional reporting requirements is a civil penalty of 48 penalty units.

Increases in pecuniary penalties

The Bill increases and aligns the maximum criminal and civil pecuniary penalties for all equivalent current and proposed work-related offences and provisions to match existing penalties for unlawfully obtaining a benefit from visa sponsorship, as well as increasing penalties for aggravated offences in a commensurate way.

The Bill proposes to increase pecuniary penalties across the work-related civil penalty provisions and related offences in the Migration Act and for approved work sponsors who fail to satisfy a sponsorship obligation under the Sponsorship Obligations Framework in the Migration Act and Regulations.

The work-related civil penalty provisions in the Migration Act currently attract a pecuniary penalty of 90 penalty units (for individuals). The civil penalty for breaching sponsorship obligations is set at 60 penalty units.

The Bill increases all of these pecuniary penalties to 240 penalty units (for individuals). While the civil penalty for breaching a sponsorship obligation is increased to 240 penalty units for an approved work sponsor, this remains at 60 penalty units for any other case (noting the Sponsorship Framework in the Migration Act also extends to family sponsors, who are not affected by these amendments).

This aligns the civil penalties for work-related civil penalty provisions, and the sponsorship obligations provision, with the higher penalties associated with the current prohibitions in sections 245AR and 245AS of the Migration Act in relation to asking for or receiving, or offering to provide or providing, a benefit in return for the occurrence of a sponsorship-related event (paying for visa sponsorship provisions).

The alignment of the pecuniary penalties associated with these civil penalty provisions demonstrates that the Government considers all contraventions of provisions relating to the employment of non-citizens to be equally serious. It seeks to better address the corrosive nature of migrant worker exploitation, and the misuse of Australia's Migration Program by some employers.

For financial penalties to have a deterrent effect, they must be set at a level that deters people from offending. The increase of civil penalties reflects the seriousness of the relevant contravention and the impact of that contravention on the migrant worker directly affected by it as well as the wider society. It also recognises the significant damage the actions of a few unscrupulous employers or labour hire intermediaries can have on visa program integrity and Australia's reputation as a destination of choice for migrant workers.

The aim of the amendments to the penalty provisions and increases to penalty units is to send a strong message to employers and third party providers that any contravention of the laws relating to migrant workers constitutes a serious breach.

New compliance tools

The Bill provides additional tools to the Australian Border Force to encourage and where necessary enforce compliance with work-related provisions in the Migration Act.

The Bill proposes to give the ABF new tools to address issues of non-compliance proportionately, and encourage greater levels of voluntary compliance. The tools are

modelled on those available to Fair Work Inspectors, to allow ABF officers to better tailor their response to non-compliant behaviour without imposing a sanction, where appropriate.

The two new tools to be enabled through this Bill are enforceable undertakings and compliance notices.

Enforceable Undertakings

The Bill would establish arrangements for the Minister or the Minister's delegate to enter into an enforceable undertaking (EU) with an employer, labour hire intermediary or other party that has not complied with work-related provisions under the Migration Act. This will include the new offences and civil penalty provisions to be introduced by the Bill, in addition to the established offences and provisions in the Migration Act.

The amendments provide a mechanism to trigger standard provisions for EUs in the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

EUs are legally binding arrangements in which an employer agrees to address contraventions and prevent future breaches. They are designed to secure quick and effective remedies for contraventions of regulatory provisions.

Importantly, EUs provide the necessary flexibility to require a person to take specific action – or refrain from a specific action – to address the underlying issues of non-compliance, based on the circumstances of the case.

EUs are most effectively used for complex cases, where there may be systemic issues of concern, and where the employer is voluntarily seeking to work with the Department to rectify issues of non-compliance. They can offer an effective mechanism to improve compliance outcomes as an alternative to prosecuting a case through the courts.

Currently under the Employer Sponsor Framework, the ABF is able to enter into an EU to improve compliance outcomes. However, there is currently no option to use an EU for employers not engaged in the 'employer sponsor' program. In order to improve compliance outcomes, there may be circumstances in which an EU would provide an effective tool to remedy non-compliance in cooperation with an employer.

For example, an EU might include an agreement in which the employer undertakes to:

- carry out an audit of all non-citizen employees to address any issues of non-compliance associated with the employment of unlawful non-citizens
- provide to the ABF evidence of that audit – and information that demonstrates a move towards compliance with work related obligations under the Migration Act (e.g. details of non-citizen workers, their visa status and conditions and their conditions of employment).
- provide to the ABF evidence that it has established procedures to support ongoing compliance with work related provisions under the Migration Act.

Compliance notices

An 'Illegal Worker Warning Notice' (IWWN) is an existing type of administrative notice that can be issued on the spot where an officer suspects that an employer may be

employing an unlawful non-citizen or a lawful non-citizen in breach of work-related visa conditions.

The purpose of an IWWN is to:

- inform the recipient that they are suspected to have contravened a work-related provision of the Migration Act, and
- provide information to the recipient about:
 - migration laws relating to employing unlawful non-citizens, or employing lawful non-citizens in breach of work-related visa conditions
 - consequences of employing unlawful non-citizens, or employing lawful non-citizens in breach of work-related visa conditions
 - statutory defences available against alleged contraventions, such as taking reasonable steps to check an employee's permission to work in Australia
 - services available to assist with the checking of visa validity and work entitlements, such as the Visa Entitlement Verification Online (VEVO) system.

An IWWN is an education tool, informing the employer that the Department suspects non-compliance, and giving the employer the opportunity to remedy their suspected non-compliant behaviour.

The introduction of compliance notice arrangements by the Bill would take that education one step further and direct the employer to undertake certain actions – or refrain from certain actions – to remedy the issue of non-compliance. Compliance notices may also include a requirement for the person to produce reasonable evidence of compliance with the notice. A compliance notice might direct an employer to:

- undertake an audit of all non-citizen employees to ensure they are not unlawful non-citizens or working in breach of a work-related visa condition
- provide evidence of that audit – and their compliance with work-related obligations under the Migration Act to the ABF (details of non-citizen workers, their visa status and conditions and their conditions of employment).

Compliance notices provide a timely, non-punitive mechanism for the Department and the ABF to address alleged contraventions of the work-related provisions of the Migration Act.

A person who complies with a compliance notice is not taken to have admitted to engaging in the conduct constituting the offence or contravention.

Where a person complies with a compliance notice, the Department is unable to commence court proceedings against that person for the particular contraventions that are the subject of the compliance notice, unless evidence of further non-compliance of those contraventions is discovered. Where a person does not comply with a compliance notice, a penalty will be triggered. Under the amendments, a failure to comply with a compliance notice attracts a civil penalty of 48 units.

Additional measures to provide appropriate safeguards to temporary migrant workers and encourage reporting

The Bill

- *repeals section 235 of the Migration Act*
- *introduces an avoidance of doubt clause for remaining work-related offence provisions, and*
- *introduces a power in the Migration Regulations to prescribe matters the Minister may or must, or must not, take into account, and the weight to be given to those matters, when considering the exercise of the visa cancellation power under section 116 of the Migration Act*

The Bill proposes to repeal section 235 of the Migration Act, which makes it a criminal offence for a temporary visa holder to work in breach of a visa condition that restricts the work they may do in Australia, or for an unlawful non-citizen to work in Australia. Prosecutions of non-citizens under section 235 have seldom been pursued and the existence of the section has had adverse effects for non-citizens even when they have not been prosecuted for this offence. Further, section 235 can act as a barrier to temporary migrant workers voluntarily reporting exploitation for fear of being prosecuted and/or removed from Australia.

The Government considers it appropriate to focus on non-compliance by employers, through criminal offence and civil penalty provisions, rather than of the non-citizen in these circumstances. Stakeholders have provided strong advocacy for the repeal of section 235 because of the unintended consequences of the offence.

The proposed avoidance of doubt clause in Division 12 Subdivision C of the Migration Act aims to resolve potential unintended adverse consequences for the non-citizen of potentially rendering their contract of service invalid for possible contravention of the provisions in Division 12 Subdivision C of the Migration Act. Aligned with the amendment to repeal section 235, the underlying goal is to ensure that these provisions do not inadvertently contribute to the abrogation of employer responsibility to provide workplace rights and entitlements.

The Bill also proposes an enabling provision to be introduced to permit the Migration Regulations to prescribe matters the Minister (or delegate) may or must, or must not, take into account when considering the exercise of the visa cancellation power under section 116 of the Migration Act, as well as the weight to be given to those matters. Section 116 of the Migration Act provides a power to cancel a non-citizen's visa on certain grounds and in certain circumstances, for example non-compliance with visa conditions. Except in certain limited prescribed circumstances, the power to cancel a visa under section 116 is discretionary. The enabling provision in the Bill will allow the Government to prescribe matters that may or must, or must not, be taken into account when exercising the discretionary power, and the weight to be given to a matter which is so prescribed. For example, the Government may prescribe certified evidence of exploitation in the workplace to be taken into account by the Minister or delegate when considering whether or not to cancel a visa, with the intention that it be a reason for the visa of the non-citizen who has been exploited not to be cancelled.

This amendment follows stakeholder feedback that the Assurance Protocol¹⁰ (a commitment between the Department of Home Affairs and Fair Work Ombudsman that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met) is not trusted amongst exploited migrant workers. Using this new enabling power, the Government will be able to reflect the intent of the Assurance Protocol in the Migration Regulations – that is, to prescribe matters to be taken into account to ensure that a temporary migrant's visa will not be cancelled for breaching a work-related visa condition if certain criteria are met. This would provide greater transparency about the protections available to visa holders who want to report their employers for exploitative work practices. The application of these protections will be carefully developed to ensure an appropriate balance can be achieved that protects migrant workers without unduly damaging the integrity of visa programs.

Human rights implications

These amendments engage the following rights:

- Right to work and the right to just and favourable conditions of work – Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- Right to freedom from slavery and servitude – Article 8 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Right to a fair trial and criminal process rights – Articles 14 and 15 of the ICCPR
- Right to privacy – Article 17 of the ICCPR
- Right to equality before the law and non-discrimination – Article 26 of the ICCPR
- Rights relating to the expulsion of aliens – Article 13 of the ICCPR.

Rights relating to work and just and favourable conditions of work

The amendment engages Article 6(1) of the ICESCR, which states that:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 7 of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

...

¹⁰ The Assurance Protocol is available at <https://immi.homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation> and <https://www.fairwork.gov.au/find-help-for/visa-holders-migrants/visa-protections-the-assurance-protocol>.

(b) Safe and healthy working conditions...

As outlined above, the amendments to the Migration Act include provisions to prohibit certain employers, intermediaries or third party providers from allowing additional temporary migrants to work for a specified period where there has been deliberate, repeated or serious non-compliance with relevant laws by the employer, intermediary or third party provider. This prohibition does not affect existing employees.

The intent of the new measure is to build on existing provisions available in the 'Employer Sponsor' framework that give the Department the ability to 'bar' an employer sponsor from engaging in the program for a specified period (under section 140M).

The effect of the prohibition for employer sponsors is to extend the bar, prohibiting the employer from allowing other additional temporary migrants to work (i.e. employing them directly or indirectly through a third party or some other means).¹¹ The effect of the prohibition for other employers (i.e. those not engaging in the employer sponsor program), is that they will be prohibited from allowing any additional temporary migrant worker to work for them.

Where an employer has been found to have engaged in serious, deliberate or repeated non-compliance, this new measure prohibits that employer from allowing additional temporary migrant workers to begin work – effectively protecting those workers from an unscrupulous employer. It also prevents that employer from accessing the migration program to meet labour needs for a specified period of time.

While this new measure may limit a temporary migrant worker's opportunity to work for a certain business (as a prohibited employer is not allowed to employ additional temporary migrants), the primary focus is the protection of the temporary migrant worker and regulating the behaviour of the employer. The aim is to ensure employers will stop engaging in exploitative work practices and misusing the migration program as an alternative source of cheap or exploitable labour.

The employer is not obliged to cease the employment of any existing employees and those existing employees (including those who are temporary migrant workers) can continue working for the prohibited employer, if they choose to do so.

Importantly, the new measure does not:

- prevent those temporary migrant workers from seeking employment with another employer; or
- affect the employment status of existing employees; or
- impose a penalty on a temporary migrant worker who chooses to commence work with a prohibited employer during their prohibited period.

The Department will publish details of the prohibition to ensure existing (and prospective) employees can make informed decisions about where they choose to work.

¹¹ Sponsored migrant workers are already accounted for under the existing bar.

The Minister (or delegate) will be referred cases to consider imposing a prohibition based on the following triggers:

that employer is convicted of a work-related offence against the Migration Act

a court makes an order against the employer in relation to the treatment of a migrant worker in contravention of:

- a work-related provision in the Migration Act, or
 - a specified provision under the Fair Work Act, including a failure to comply with a compliance notice issued for alleged contravention of certain provisions, or
 - an offence relating to slavery, slavery-like practices or trafficking in persons under Division 270 and 271 of the Criminal Code, or
 - a relevant offence or civil penalty provision prescribed by the regulations.
- an employer has been barred from sponsoring migrant workers through the Migration Act's Employer Sponsorship Framework
 - the employer has failed to comply with a compliance notice issued under the Fair Work Act for alleged contraventions of certain provisions or failed to comply with the terms of an enforceable undertaking reached with the Fair Work Ombudsman under the Fair Work Act.

The proposal focuses on:

- those contraventions that are most serious in nature, including deliberate or repeated non-compliance; and
- addressing a gap identified in the existing Employer Sponsorship Framework, namely that an employer sponsor barred under section 140M can currently employ other temporary migrant workers, even if they are barred from sponsoring visas.

The prohibition may have some broader workforce impacts. For example, if an employer is suffering labour shortages, and that employer is highly dependent on temporary migrant workers to meet demand, the inability to employ additional temporary migrant workers may have a negative impact on the existing workers (through workload pressures or the ongoing viability of the business itself).¹² While this could have unintended consequences for existing workers, the ongoing viability and other impacts to the business can be outlined for consideration in the Minister's decision whether or not to impose a prohibition on the employer. The employer will have an ability to highlight these concerns prior to a prohibition declaration being made through the 'show cause' process. This allows the Minister to take these types of considerations into account when making a decision.

¹² It is important to note that the employer can employ other workers, including Australian citizens and permanent residents. The employer may need to consider how it can attract those other workers.

By making the prohibition discretionary, and by providing procedural fairness through the 'show cause' process, the measure provides for a degree of flexibility to consider individual circumstances (including potential implications for existing employees) before applying the prohibition.

The Bill aims to combat the misuse of Australia's migration program and the exploitation of migrant workers. The prohibition measure and the other measures in the Bill seek to protect temporary migrant workers from unscrupulous employers. In doing so, these measures should positively enhance just and favourable working conditions for temporary migrant workers by targeting employers who are non-compliant with their workplace obligations or who are misusing the visa status of those workers to exploit them.

Under the new criminal offences, the amendments provide migrant workers with an avenue to pursue employers who exert undue influence, pressure or coercion over them in the workplace, including in relation to work-related visa conditions. It includes threats relating to:

- a migrant worker's visa conditions or right to work,
- any future visa applications,
- the potential for a visa to be cancelled or refused, and
- removing the non-citizen from Australia.

The aim is to remove possible levers inherent in the temporary nature of a temporary migrant's status in Australia, which unscrupulous employers might use in order to engage in exploitative behaviour.

The repeal of section 235 and the introduction of an avoidance of doubt provision for remaining work offences under the Migration Act further removes the ability of employers to use a temporary migrant worker's status to engage in exploitation. In addition, the new ability to prescribe matters that may or must be taken into account when exercising visa cancellation powers under section 116 of the Migration Act is intended to ensure that temporary migrant workers are better able to exercise their workplace rights. This is because the Government intends to clarify the weight to be given to evidence of exploitation when considering whether or not to cancel a person's visa, in line with the existing Assurance Protocol and with the broader objective of making it easier for exploited workers to report their employers without fear of this affecting their immigration status in Australia.

The other measures included in the Bill are also broadly aimed at promoting the right of migrant workers to enjoy just and favourable conditions in the workplace by ensuring employers do not misuse the migration program as an alternative source of cheap and exploitable labour.

The broad aim of the proposed legislative amendments is to ensure temporary migrant workers are able to enjoy just and favourable and equitable conditions in the workplace. Any impact on a person's ability to work for a particular employer that may result from a prohibition aims to protect temporary migrant workers from exploitation. The prohibition would not limit the worker's right to work for another employer or continue working for the 'prohibited employer' if they chose to do so.

Rights relating to freedom from slavery and servitude

Article 8 of the ICCPR states:

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour...

Through the proposed criminal offences, this Bill seeks to address potential gaps in existing laws that seek to address the issue of modern slavery.

As noted above, the intent of the new criminal offences is to ensure employers are not able to use a temporary migrant worker's immigration status to exert undue influence, pressure or coercion over them in the workplace. That is, they cannot coerce them into accepting unfavourable conditions under threat of being reported to the Department of Home Affairs or the Australian Border Force.

The new offences provide an avenue to pursue cases that do not meet existing thresholds under the Criminal Code for prosecution through the courts.

In addition, the prohibition measure includes triggers that directly reference Division 270 and 271 of the Criminal Code, furthering the goal of protecting temporary migrant workers from the serious offences of slavery, slavery-like practices and trafficking in persons.

The measures in the Bill therefore promote the rights relating to freedom from slavery and servitude.

Rights relating to a fair trial and criminal processes

The Bill introduces new criminal offences and new civil penalties. It also raises the maximum pecuniary penalties for existing offences and civil penalty provisions relating to the employment of migrant workers, and introduces new compliance tools.

These measures may engage the rights in Articles 14 and 15 of the ICCPR, including the presumption of innocence (article 14(2)), the right not to be tried or punished twice for the same offence (article 14(7)) and the guarantee against retrospective criminal laws (article 15(1)).

New criminal offences

The new criminal offence provisions are consistent with these rights. They:

- apply to conduct that occurs after the commencement of the provision,
- do not impose minimum sentences or penalties, and
- will be prosecuted in conformity with the normal criminal process guarantees, including those relating to court proceedings and the use of evidence.

New civil penalty provisions

The Parliamentary Joint Committee on Human Rights Practice Note 2 notes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law.

When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of ICCPR.

All of the new civil penalty provisions apply to contraventions by employers and labour hire intermediaries, in the context of a regulatory framework, and do not apply to the general public.

Some of the new civil penalty provisions are being introduced alongside a criminal offence and serve as an alternative to prosecution. The availability of both civil and criminal penalties allows for a graduated response to these practices, allowing flexibility to discern whether a civil penalty, which does not attract the same consequences as a criminal penalty, is more appropriate in a case than using the criminal offence.

For the civil penalty provisions that are alternatives to prosecution of the new criminal offences relating to coercion and the new offence relating to contravening a prohibition, the maximum penalty of 240 penalty units reflects the serious nature of the contravention and the severity of the circumstances that lead to a prohibition being imposed.

If these new civil penalty provisions are considered as criminal in nature due to the substantial pecuniary sanction, they may limit the right to presumption of innocence since they involve the civil standard of proof and do not require proof of the person's state of mind. The Government contends that any such limitations would be reasonable, necessary and proportionate to the legitimate objective of preventing and deterring the exploitative work practices of unscrupulous employers and labour hire intermediaries, which harm vulnerable migrant workers and undermine the integrity of Australia's migration program. It is a matter for the Court to decide the appropriate penalty depending on the circumstances of the case before it.

The other new civil penalty provisions are set at a lower level because, while important, the Government classifies them as general civil contraventions. These include contraventions for:

- breaching the additional reporting obligations for (former) prohibited employers
- failing to comply with a compliance notice.¹³

As general civil contraventions, lower penalties apply. These civil penalty provisions should not be considered criminal in nature, due to the lower penalties as well as their regulatory/disciplinary context.

Prohibition measure

The prohibition on certain employers from employing additional temporary migrant workers for a specified period may raise concerns about the right not to be tried or punished twice for the same offence (article 14(7)). However, the Government contends that the intent is not to 're-prosecute', 're-convict' or punish the employer for the same offence / contravention, triggering the *same* penalties; rather it is to protect possible future

¹³ Compliance notices give an employer an opportunity to comply with their obligations without punishment. Where an employer complies with a compliance notice, the Department is unable to commence court proceedings against that person for the particular contraventions that are the subject of that compliance notice.

temporary migrant workers from an employer that has engaged in serious, repeated or deliberate non-compliance in their actions against temporary migrant workers. In the process, it also seeks to act as an additional deterrent to employers engaging in serious contraventions in order to change non-compliant behaviour.

The prohibition will prohibit a prohibited employer from engaging additional non-citizens once they have been declared by the Minister to be a prohibited employer. The conduct prohibited by the provision will not be the same conduct that resulted in the employer being declared to be a prohibited employer.

The aim is to implement Recommendation 20 from the Taskforce Report, recognising the policy intent to address the serious misuse of Australia's migration program, addressing:

- persistent issues of underpayment (exploiting migrant workers as a cheap alternative source of labour) and other exploitative practices; and
- identified gaps in the existing regulatory framework, which includes a bar to prevent employer sponsors engaging in the sponsorship program (currently barred employer sponsors are not prevented from replacing sponsored employees with other temporary migrant workers).

The prohibition will only be triggered by the most serious cases and it will come into effect after a deliberation of the circumstances of the case, including consideration of any additional information the employer would like considered through 'show cause' processes. It therefore offers sufficient flexibility to consider individual circumstances and treat cases differently. It is not intended as a limitation on the right not to be tried or punished again for an offence.

Increasing pecuniary penalties for existing offences and civil penalty provisions

To the extent that increasing the pecuniary penalties for the existing civil penalty provisions may result in these provisions also being considered to be more 'criminal' in nature, the increase demonstrates the Government's commitment to taking the misuse of migration rules to exploit a migrant worker seriously.

For financial penalties to have a deterrent effect, they must be set at a level that deters people from offending. The increased civil penalties reflect the seriousness of the relevant contravention and the impact of that contravention on the migrant worker directly affected by it as well as the wider society. It also recognises the significant damage the actions of a few unscrupulous employers or labour hire intermediaries can have on visa program integrity and Australia's reputation as a destination of choice.

The Government contends that any consequent limitations on criminal process rights are reasonable, necessary and proportionate to these legitimate objectives.

Rights relating to privacy

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Pursuant to Article 17(1) of the ICCPR, any interference with an individual's privacy must have a lawful basis. In addition to requiring a lawful basis for limitation on the right to

privacy, Article 17 prohibits arbitrary interference with privacy. Interference which is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances.

As outlined above, the proposed prohibition, which seeks to prevent certain employers from employing additional temporary migrant workers for a specified period, includes provisions that require the Minister to publish certain information on the Department's website. The information that is required to be published includes:

- details of the prohibited employer,
- the contravention(s) that gave rise to the prohibition, and
- the period during which the person is a prohibited employer.

While the Bill does provide for some flexibility for the Minister to be able to prescribe in the regulations the circumstances in which publication is not required, publishing the details of the prohibition:

- supports the implementation of the prohibition, providing transparency for employers, enforcement officials and prospective employees about the relevant contravention and the prohibition;
- informs existing and potential employees of the relevant behaviour of their employer;¹⁴ and
- deters other employers from engaging in non-compliant behaviour.

The intention is that the website will list the minimum details necessary for implementation.

The publication of prohibited employers is similar to a number of existing schemes that publish the details of sanctions, including:

- the 'Register of sanctioned sponsors' on the ABF website
- the 'Disciplinary decisions' register in the Office of the Migration Agents Registration Authority pages of the Department of Home Affairs website
- the publication of litigation outcomes on the Fair Work Ombudsman's website
- the banned and disqualified people register on the Australian Securities and Investments Commission's website
- the 'Food safety register of convictions' on the Victorian Department of Health's website
- the *Sport Integrity Australia Act 2020* (Cth) which allows for the publication of a person's details following a sanction.

¹⁴ The aim is to ensure the prohibition is communicated publicly, via the Department's website, with links from the Visa Entitlement Verification Online system, providing for maximum transparency to existing non-citizen workers and other non-citizens who might be looking for employment opportunities.

The Bill includes a number of processes to ensure that the prohibition only applies to the most serious cases of non-compliance, incorporating processes to give the employer an ability to ‘show cause’ as to why the prohibition should not apply, and review rights.

Much of the information to be published if an employer is declared to be a prohibited employer will have already been publicly available through the publication of court findings, or entries on the ABF Register of Sanctioned Employers.

While there is no legislative requirement to remove the details of a prohibited employer once the prohibition is no longer in effect, the aim is to ensure the details are removed as soon as reasonably practicable.

The Government considers that the publication of the prohibited employers list would not only be lawful, but reasonable and justified. The publication of the information is proportionate to the overarching aim of protecting temporary migrant workers from employers found to have engaged in serious, repeated or deliberate non-compliance with workplace laws and obligations.

Rights relating to equality before the law and non-discrimination

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Bill may engage the right to equality before the law and non-discrimination.

The measures in the Bill, particularly the prohibition on sanctioned employers from employing additional temporary migrant workers, will operate in relation to certain non-citizens only. They will not operate in relation to the employment of Australian citizens or Australian permanent residents. While this represents a differentiation based on immigration and citizenship status, these measures are consistent with the overarching intent of the Bill to address the exploitation of migrant workers. The Report of the Migrant Workers’ Taskforce highlighted that there are a range of factors that make migrant workers particularly vulnerable to unscrupulous practices at work. This includes many of these workers having poor knowledge of their workplace rights, being young and inexperienced, having low English language proficiency, and trying to fit in with cultural norms and expectation of other people from their home countries. Through the differentiation, the Bill seeks to enhance the right of temporary migrant workers to enjoy equitable conditions at work, as they are more likely to be in a vulnerable employment position compared to Australian citizen and permanent resident workers.

Noting the overarching intent, the Government believes this differentiation is reasonable, necessary and proportionate to achieving legitimate aims.

Rights relating to the expulsion of aliens

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with

law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

As the cancellation of a visa held by a non-citizen lawfully in Australia can lead to removal, the cancellation process as a whole can amount to expulsion as contemplated in Article 13 of the ICCPR.

The Bill does not introduce any new visa cancellation powers or grounds, or make any changes to review of visa cancellation decisions. Rather the Bill would introduce an enabling provision to permit the Migration Regulations to prescribe matters the Minister (or delegate) may or must, or must not, take into account when considering the exercise of the discretionary visa cancellation powers under section 116 of the Migration Act, as well as the weight to be attributed to those matters. If prescribed, the matters that would be taken into account will be apparent on the face of the regulations, rather than being matters of policy.

The Bill does not prescribe any such matters, but in the context of the measures included in the Bill, the Government's intention is to reflect the existing protections available in policy to encourage visa holders to report exploitation, and to provide assurance – under specified circumstances – that they will not have their visa cancelled, even if they have breached a work-related condition of their visa. It is therefore intended as a positive measure for affected visa holders and would not lead to their expulsion.

The introduction of this enabling provision does not limit the rights in Article 13 of the ICCPR. Any time that such matters are prescribed under this new power, they will be accompanied by a Statement of Compatibility with Human Rights that will provide further information about the matters being prescribed and the human rights implications of prescribing those matters.

Conclusion

The measures included in the Migration Amendment (Strengthening Employer Compliance) Bill 2023 are compatible with human rights as they protect the human rights of vulnerable migrant workers in Australia. The measures strengthen employer compliance and support the protection of migrant workers from worker exploitation. To the extent that the proposed measures may limit human rights, those limitations are reasonable, necessary and proportionate to the objective.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs