2019–2020–2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (PROTECTING MIGRANT WORKERS) BILL 2021

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Honourable Alex Hawke MP)

MIGRATION AMENDMENT (PROTECTING MIGRANT WORKERS) BILL 2021

GENERAL OUTLINE

The Government is taking action to strengthen the legislative framework that protects migrant workers from exploitation and unscrupulous practices in the workplace. This Bill enhances protections for vulnerable migrant workers and increases sanctions under the *Migration Act 1958* (the Migration Act) against unscrupulous employers, labour hire intermediaries and others who seek to exploit them. The amendments in this Bill also complement existing protections for vulnerable workers under the *Fair Work Act 2009* (the Fair Work Act), ensuring that migrant workers in Australia are appropriately protected and empowered to address unlawful conduct in the workplace.

The underpayment and exploitation of migrant workers is a longstanding problem with significant impacts on individuals and the community. Unscrupulous employers exploit migrant workers in a number of ways, including through wage underpayment, pressure to work beyond visa restrictions and withholding of passports. The exploitation of vulnerable workers is equally unacceptable to non-citizens as it is to citizens. It threatens to damage Australia's reputation and distorts the proper functioning of the labour market and economy.

The Migration Amendment (Protecting Migrant Workers) Bill 2021 (the Bill) amends the Migration Act to introduce new offences and related civil penalty provisions for employers, labour hire intermediaries and other persons in the employment chain who coerce or exert undue influence or undue pressure on a non-citizen to accept or agree to an arrangement in relation to work:

- involving a breach of a work-related condition applying to the non-citizen; or
- to satisfy a work-related visa requirement; or
- to avoid an adverse effect on the non-citizen's immigration status.

The Bill also includes amendments to the Migration Act that will:

- establish a power to declare a person to be a prohibited employer if they are subject to a specified migrant worker sanction, and to prevent that prohibited employer from allowing additional non-citizens to begin working for that employer for a specified period;
- introduce positive obligations for employers and other parties in the employment chain to use the Visa Entitlement Verification Online (VEVO) system to verify prospective non-citizen workers' immigration status and work-related visa conditions, prior to employing or referring non-citizens for work;
- align and increase penalties for work-related offences and contraventions of work-related civil penalty provisions under the Migration Act, to act as effective deterrent against unscrupulous employers who exploit vulnerable migrant workers because the costs associated with being caught may be viewed as an acceptable cost of doing business;

- provide the Australian Border Force (ABF) with new regulatory powers (in relation to compliance notices and enforceable undertakings) to support behavioural change and enhance compliance and enforcement efforts in relation to the work-related offences and civil penalty provisions under the Migration Act.

Through the amendments of the Migration Act included in this Bill, the Government is delivering on its response to the recommendations made in the *Report of the Migrant Workers' Taskforce (March 2019)*, particularly recommendations 19 and 20:

> **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 Migrant Workers' Taskforce released its Report on 7 March 2019. The Report is available at https://www.ag.gov.au/industrial-relations/migrant-workers-taskforce.

This Bill implements the Government's response to recommendations 19 and 20, and builds on existing compliance mechanisms and sanctions available under the Migration Act. The Bill also supports Australia's economic recovery from COVID-19. The amendments in this Bill will ensure Australia maintains a strong reputation as a destination of choice for working holiday makers, students and temporary migrant workers in general, as well as skilled migrants.

The Bill enhances the role of the Migration Act in combatting migrant worker exploitation by supporting visa program integrity. The national workplace relations system, including the 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 Attorney General's Department 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.

Consultation

The Government released an exposure draft of the Bill on 26 July 2021, and invited stakeholders and the broader Australian community to provide feedback on the proposed amendments of the Migration Act. The Department of Home Affairs (the Department) received 32 submissions in the course of the consultation process, and also sought the views of the Ministerial Advisory Council on Skilled Migration. Feedback on the exposure draft of the Bill has enabled the Government to refine the Bill to clarify the measures, and to ensure the amendments of the Migration Act are appropriately targeted to support and enhance the Government's efforts to combat migrant worker exploitation.

The Department has also undertaken consultation with appropriate Commonwealth agencies in the course of developing the Bill, including the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Fair Work Ombudsman and the Office of Best Practice Regulation.

FINANCIAL IMPACT STATEMENT

The amendments in the Bill have a low financial impact.

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*.

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	*Administrative Appeals Tribunal Act 1975*
Acts Interpretation Act	*Acts Interpretation Act 1901*
ABF	Australian Border Force
AGD Framing Guide	The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
APP (or APPs)	The Australian Privacy Principles, under the *Privacy Act 1988*
Crimes Act	*Crimes Act 1914*
Bill	Migration Amendment (Protecting Migrant Workers) Bill 2021
Criminal Code	The Commonwealth *Criminal Code*
Department	Department of Home Affairs
Fair Work Act	*Fair Work Act 2009*
FWO	Fair Work Ombudsman
Legislation Act	*Legislation Act 2003*
Migration Act	*Migration Act 1958*
Migration Regulations	*Migration Regulations 1994*
Privacy Act	*Privacy Act 1988*
Regulatory Powers Act	*Regulatory Powers (Standard Provisions) Act 2014*
SES	Senior Executive Service
Subdivision C	Subdivision C of Division 12 of Part 2 of the Migration Act
Taskforce	Migrant Workers' Taskforce
Taskforce Report	*Report of the Migrant Workers' Taskforce (March 2019)*

MIGRATION AMENDMENT (PROTECTING MIGRANT WORKERS) BILL 2021

NOTES ON INDIVIDUAL CLAUSES

Section 1 Short title

1. Section 1 provides that the short title of this Bill, once enacted, will be the *Migration Amendment (Protecting Migrant Workers) Act 2021*.

Section 2 Commencement

2. Section 2 sets out the times at which the various provisions of the Act commence.

3. Subsection 2(1) provides that each provision of the 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.

4. Table item 1 provides that sections 1 to 3 and anything in the Act not covered elsewhere by the table will commence on the day the Act receives the Royal Assent.

5. Table item 2 provides that Schedule 1 will commence on a single day to be fixed by Proclamation. If the provisions do not commence within the period of 12 months beginning on the day the Act receives the Royal Assent, they commence on the day after the end of that period.

6. A note at the foot of the table explains that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments of the Act.

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

8. Commencement by Proclamation with a restriction of 12 months is appropriate in relation to the provisions of Schedule 1 of the Act. Given the nature of the amendments of the Migration Act by the provisions of Schedule 1 to the Act, this commencement provision 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 1994* (the Migration Regulations) required to support the amendments of the Migration Act.

9. This commencement provision also provides time for the Department and the ABF to engage with stakeholders, and to ensure that employers, labour hire intermediaries and other 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.

Section 3 Schedules

10. 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 Subsection 5(1)

11. This item inserts a new signpost definition for the term ***work-related visa requirement*** in subsection 5(1) of the Migration Act. This new definition provides that, for the purposes of the Migration Act, this term has the meaning given by new section 245AAB. New section 245AAB is inserted by item 4 of this Part of Schedule 1 to the Bill.

12. The purpose of this amendment is to establish that where the term ***work-related visa requirement*** is used in the Migration Act, it has the meaning given by section 245AAB, unless a contrary intention appears.

Item 2 Before paragraph 245AA(1)(a)

13. This item amends current subsection 245AA(1) of the Migration Act, inserting new paragraph 245AA(1)(aa) before current paragraph 245AA(1)(a), to refer to the new offences and civil penalty provisions inserted by item 4 in this Part.

14. Current section 245AA provides an explanatory overview of current Subdivision C of Division 12 of Part 2 of the Migration Act (Subdivision C). It also refers the reader to current section 235 in Subdivision A of Division 12 of Part 2 of the Migration Act. Section 235 contains offences relating to work by an unlawful non-citizen, and a non-citizen in breach of a visa condition.

15. Current subsection 245AA(1) provides an outline of the offences and civil penalty provisions in Subdivision C. The insertion of new paragraph 245AA(1)(aa) ensures that the overview of Subdivision C, as amended, includes reference to new sections 245AAA and 245AAB, which contain the new criminal offences and civil penalty provisions inserted by item 4 in this Part. These new offences and civil penalty provisions relate to circumstances where a person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to a work arrangement:

- involving a breach of a work-related condition applying to the non-citizen; or
- to satisfy a work-related visa requirement; or
- to avoid an adverse effect on the non-citizen's immigration status.

Item 3 After paragraph 245AA(2)(a)

16. This item inserts new paragraph 245AA(2)(ab) in current subsection 245AA(2) of the Migration Act.

17. As part of the overview of Subdivision C provided in current section 245AA, current subsection 245AA(2) sets out various terms that are used by provisions in Subdivision C.

The terms listed in this subsection are defined in various sections of Subdivision C, or elsewhere in the Migration Act.

18. The insertion of new paragraph 245AA(2)(ab), after current paragraph 245AA(2)(a), ensures that the overview includes the new term ***work-related visa requirement***, which is defined in new subsection 245AAB(5). New section 245AAB is inserted by item 4 in this Part. Section 245AAB is described in more detail below, including in relation to the new defined term ***work-related visa requirement*** and the purpose of this term in that section.

Item 4 After section 245AA

19. This item inserts new sections 245AAA and 245AAB in current Subdivision C, immediately after current section 245AA.

20. New sections 245AAA and 245AAB establish new criminal offences and related civil penalty provisions that apply where a person coerces, or exerts undue influence or undue pressure on, a non-citizen to accept or agree to a work arrangement:

- involving a breach of a work-related condition applying to the non-citizen; or
- to satisfy a work-related visa requirement; or
- to avoid an adverse effect on the non-citizen's immigration status.

New section 245AAB – offence to coerce, exert undue influence or pressure on a non-citizen to breach work-related conditions

21. New section 245AAA establishes a new offence in current Subdivision C for a person to coerce, or to exert undue influence or undue pressure on a non-citizen to accept or agree to a work arrangement involving a breach of a work-related condition applying to the non-citizen. Section 245AAA also establishes a civil penalty in relation to this conduct, as an alternative to the offence.

Physical elements of the offence

22. New subsection 245AAA(1) establishes the physical elements that constitute the new offence. Paragraphs 245AAA(1)(a), (b) and (c) set out the elements of the offence.

23. New paragraph 245AAA(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, a non-citizen to accept or agree to an arrangement in relation to work.

24. New paragraph 245AAA(1)(b) provides that the second element of the offence is that the work referred to in paragraph 245AAA(1)(a) is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or for someone else.

25. New paragraph 245AAA(1)(c) provides that the third element of the offence is that, as a result of the arrangement referred to in paragraph 245AAA(1)(a), either:

- the non-citizen breaches a work-related condition; or

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

The meaning of 'work' and 'work-related condition'

26. The term ***work-related condition*** is defined under current subsection 5(1) of the Migration Act, to mean a condition:

- prohibiting the holder of a visa from working in Australia; or
- restricting the work that the holder of a visa may do in Australia.

27. The term ***work*** is also relevantly defined for the purposes of Subdivision C. Current subsection 245AG(1) provides that, for the purposes of this Subdivision, ***work*** means any work, whether for reward or otherwise.

Coercion, undue influence or undue pressure

28. New section 245AAA does not define coercion, undue influence or undue pressure, instead leaving the meaning of these terms to the general law. Relevantly, the purpose of criminalising undue influence or pressure in this offence, rather than *any* influence or pressure, is to target conduct that, similar to coercion, may be characterised as excessive, unfair or exploitative.

29. Undue influence or pressure may arise from widely different sources, dependent on the facts and circumstances of the alleged offending, one of which is excessive pressure. It is not intended that, to be considered undue, the influence or pressure must be characterised as illegitimate or improper. Undue influence or pressure is a lower threshold than coercion.

New subsection 245AAA(1) – illustrative example

Person A is a student visa holder, subject to a work-related condition that provides that the holder must not work more than 40 hours a fortnight during any fortnight when the holder's course of study is in session.

Person A has been working for Employer A1 (a local café) for approximately six months on a casual basis. Person A is usually rostered on to work shifts equating to approximately 35 hours per fortnight.

Employer A1's café has been experiencing a downturn in customer numbers. Having also recently refurbished the premises, Employer A1 reduces the number of staff it employs in an effort to save on expenses. Employer A1 asks Person A to accept a temporary reduction in their hourly rate, explaining that they can make up the money by doing some extra shifts (to cover the staff that have been let go). Employer A1 indicates this will only be a temporary arrangement, until business picks up again.

Person A reluctantly accepts the offer – temporarily – because they need the money. They request that they are paid 'cash in hand'.

Two months later, Person A is still working over 50 hours per fortnight. It is affecting their studies, and they are becoming increasingly nervous.

Person A asks to have their hours reduced so that they are working less than 40 hours per fortnight, and to have their original hourly rate reinstated. Employer A1 responds by saying that Person A's hours will be cut completely if they do not continue working as rostered, for the lower rate. In need of the income to pay their rent, Person A reluctantly agrees to the arrangement.

In this scenario, Employer A1 has contravened new subsection 245AAA(1).

Offence

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

31. The penalty for this offence is imprisonment for two years, or 360 penalty units, or both.

32. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty units in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

Attempts to commit an offence

33. The effect of section 11.1 of the *Criminal Code* is that criminal liability would also extend to persons who attempt to commit the offence in section 245AAA(1). This is reflected in the element of the offence at subparagraph 245AAA(1)(c)(ii), which contemplates circumstances in which the non-citizen does not accept or agree to the arrangement in paragraph 245AAA(1)(a), but if they had done so, there are reasonable grounds to believe the non-citizen would breach a work-related condition.

34. Subparagraph 245AAA(1)(c)(ii) is intended to be objective—that is, it is met if the coercion, or undue influence or undue pressure, to agree to the arrangement would, objectively assessed, result in a person in the position of the non-citizen believing if the non-citizen were to accept or agree to the arrangement, the non-citizen would breach a work-related condition.

Fault elements

35. New subsection 245AAA(3) provides that, for the purposes of the offence provision in new subsection 245AAA(2), the fault element for paragraphs 245AAA(1)(b) and (c) is knowledge or recklessness by the first person.

36. By expressly providing that the fault elements in relation to the physical elements in new paragraphs 245AAA(1)(b) and (c) 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.

37. The purpose of this subsection is to prevent the prosecution from having to prove that the defendant intended to put the non-citizen in breach of a work-related condition of their visa by reason of the arrangement referred to in new paragraph 245AAA(1)(a). Without this provision, proof of this element to the required standard could be difficult in cases where the defendant has been wilfully blind or recklessly indifferent to the non-citizen's visa conditions. It is not acceptable for a person to seek to rely on a claim that they did not enquire in relation to the work-related conditions of a non-citizen worker or prospective worker's visa, and that they were therefore unaware that the arrangement would or may result in the non-citizen breaching a work-related condition.

38. New subsection 245AAA(3) has the effect that it would, for example, suffice for the prosecution to prove either that an employer knew that an arrangement as to increased working hours would cause the non-citizen to breach a work-related condition of their visa, or that the employer was reckless as to that outcome. It is not necessary to prove that the employer intended for the non-citizen to breach the visa condition.

39. For example, an employer knows an employee is a student visa holder, but they intentionally roster that employee onto shifts that would result in them exceeding 40 hours per fortnight (the maximum hours permitted while their course is in session). The employer threatens to replace them if they do not do the additional work, and suggests they have done the same to other employees in the past. That employer should not be able to avoid criminal liability on the basis that they did not know the exact terms of the work-related condition of the employee's student visa.

40. Relevantly, new subsection 245AAA(3) does not specify a fault element for new paragraph 245AAA(1)(a). Accordingly, under current subsection 5.6(1) of the *Criminal Code,* intention applies as the default fault element in relation to this paragraph. In criminal proceedings, this would require the prosecution to prove beyond reasonable doubt that the defendant engaged in conduct of an illegitimate nature intended to lead the non-citizen to agree to the work arrangement. For clarity, it is not intended for the prosecution to be required to prove a link between the conduct by the first person under new paragraph 245AAA(1)(a) and knowledge or recklessness by the first person as to compliance by the non-citizen with a work-related condition of the non-citizen's visa. These are separate elements of the conduct rule.

41. Section 5.3 of the *Criminal Code* provides that a person has knowledge of a circumstance or a result if they are aware that it exists or will exist in the ordinary course of events.

42. Subsection 5.4(1) of the *Criminal Code* provides that a person is reckless with respect to a circumstance if:

- they are aware of a substantial risk that the circumstance exists or will exist; and
- having regard to the circumstances known to that person, it is unjustifiable to take the risk.

43. Subsection 5.4(2) of the *Criminal Code* provides that a person is reckless with respect to a result if:

- they are aware of a substantial risk that the result will occur; and

- having regard to the circumstances known to that person, it is unjustifiable to take the risk.

General defences under the Criminal Code

44. As they have not been excluded, the general defences in Chapter 2 of the *Criminal Code* will apply in relation to this offence.

Civil penalty provision

45. New subsection 245AAA(4) provides that a person is liable to a civil penalty of 240 penalty units if the person contravenes subsection 245AAA(1).

46. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty units in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

47. This penalty must also be read with current paragraph 486R(5)(a) of the Migration Act. Paragraph 486R(5)(a) 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.

48. This penalty must also be read with current 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.

49. A note immediately below new subsection 245AAA(4) draws the reader's attention to current section 486ZF of the Migration Act. 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 of the Migration Act (other than subsection 245AK(2)).

50. The intent of this note is to clarify that, for the purposes 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 knowledge or recklessness by the first person in relation to new paragraphs 245AAA(1)(b) and (c) in a criminal offence, or the default element of intention in relation to new paragraph 245AAA(1)(a).

51. 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. The application of non-fault civil penalties in Subdivision C reflects the Government's determination to address the problems of illegal work hire practices and exploitation of migrant workers.

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 subsection 245AAA(1) is liable to a civil penalty of this order. The civil penalty in subsection

245AAA(4) sits alongside the offence in subsection 245AAA(2), and reflects the serious character 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***, as amended by the items in Part 4 of the Schedule to the Bill. As well as providing an effective deterrent, it is appropriate that a person who contravenes subsection 245AAA(1) should be liable to a substantial penalty in relation to that contravention.

The conduct rule provision

53. New subsection 245AAA(4) relies on the ***conduct rule provision*** in current section 245AL of Subdivision C. The purpose of the conduct rule provision is to ensure that references to a contravention of a civil penalty provision in Subdivision C of Division 12 of Part 2 of the Migration Act pick up a contravention of the relevant conduct rule provision.

54. Subsection 245AL(1) applies to those provisions that state a person is liable to a civil penalty if they contravene another provision of Subdivision C. The effect of subsection 245AL(2) is that, if a person contravenes a provision that states that a person contravenes that provision if they do a certain act, the person is taken to contravene the associated civil penalty provision and so is liable for a civil penalty.

55. For example, the effect of subsection 245AL(2) 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. In the absence of current section 245AL, the person would not be liable to a civil penalty because new subsection 245AAA(4) cannot be contravened in its own right.

New section 245AAB – offence to coerce, exert undue influence or pressure on a non-citizen by using migration rules

56. New section 245AAB establishes a new offence for a person to coerce, or to exert undue influence or undue pressure on a non-citizen to accept or agree to a work arrangement:

- to satisfy a work-related visa requirement; or
- to avoid an adverse effect on the non-citizen's immigration status under Division 1 of Part 2 of the Migration Act.

57. Section 245AAB also establishes a civil penalty in relation to this conduct, as an alternative to the offence.

Physical elements of the offence

58. New subsection 245AAB(1) establishes the physical elements that constitute the new offence. Paragraphs 245AAB(1)(a), (b) and (c) set out the elements of the offence.

59. New paragraph 245AAA(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 a non-citizen to accept or agree to an arrangement in relation to work.

60. New paragraph 245AAA(1)(b) provides that the second element of the offence is that the work referred to in paragraph 245AAA(1)(a) is carried out, or is to be carried out, by the non-citizen in Australia, whether for the first person or for someone else.

61. New paragraph 245AAA(1)(c) provides that the third element of the offence is that the non-citizen believes, or there are reasonable grounds to believe, that the non-citizen must accept or agree to the arrangement, either:

- to satisfy a ***work-related visa requirement*** (within the meaning given by new subsection 245AAB(5)); or

- to avoid an adverse effect on the non-citizen's immigration status under Division 1 of Part 2 of the Migration Act.

The non-citizen's immigration status under Division 1 of Part 2 of the Migration Act

62. Current Division 1 of Part 2 of the Migration Act includes sections 13 and 14, which define the terms ***lawful non-citizen*** and ***unlawful non-citizen*** respectively for the purposes of the Migration Act. Section 15 also relevantly clarifies the effect of visa cancellation on a non-citizen's immigration status.

63. Section 13 of the Migration Act provides that a lawful non-citizen is a non-citizen in the migration zone who holds a visa that is in effect.

64. Section 14 of the Migration Act, when read in conjunction with section 13, effectively provides that an unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa that is in effect. For example, this may include non-citizens who overstay their visas or non-citizens who enter and remain in Australia without holding visas.

New subsection 245AAB(1) – illustrative examples

Subparagraph 245AAB(1)(c)

Person B is a student visa holder, subject to a work-related condition that provides that the holder must not work more than 40 hours a fortnight during any fortnight when the holder's course of study is in session.

Person B has been working for Employer A2 for approximately six months on a casual basis. When Person B started working for Employer A2, they were usually rostered on to work shifts equating to approximately 25-30 hours per fortnight.

Person B's hours have gradually increased following the departure of other employees. Person B is now working on average 45-50 hours per fortnight, including when their course of study is in session.

Person B approaches Employer A2 to ask for their hours to be reduced so that they are only working 40 hours per fortnight. Person B explains that they are finding it difficult to balance their study and work commitments, and are concerned because they have recently become aware of other student visa holders whose visas have been cancelled for a breach of the work-related condition after working more than 40 hours per fortnight.

Employer A2 declines Person B's request. Employer A2 states that Person B needs to keep working their current shifts, because Employer A2 has not yet been able to backfill vacant positions. Person B asks again, and Employer A2 responds that Person B needs to keep working the same hours, and that if they do not, Employer A2 will report them to the ABF for breaching their visa conditions. Person B had heard from a colleague that Employer A2 had done something similar previously to another student visa holder – and that that student visa holder is no longer in Australia. Person B agrees to keep working as rostered.

In this scenario, Employer A2 has contravened new subsection 245AAB(1).

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. Relevantly, the purpose of criminalising undue influence or pressure in this offence, rather than *any* influence or pressure, is to target conduct that, similar to coercion, may be characterised as excessive, unfair or exploitative.

66. Undue influence or pressure may arise from widely different sources, dependent on the facts and circumstances of the alleged offending, one of which is excessive pressure. It is not intended that, to be considered undue, the influence or pressure must be characterised as illegitimate or improper. Undue influence or pressure is a lower threshold than coercion.

Offence

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

68. The maximum penalty for an offence under new subsection 245AAB(2) is 2 years imprisonment, or 360 penalty units, or both. This penalty must be read together with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty units in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

Attempts to commit an offence

69. The effect of section 11.1 of the *Criminal Code* is that criminal liability would also extend to persons who attempt to commit the offence in section 245AAB(1). This is reflected in the element of the offence at subparagraph 245AAB(1)(c), which contemplates circumstances in which the non-citizen does not accept or agree to the arrangement in paragraph 245AAA(1)(a), but if they had done so, there are reasonable grounds to believe that the non-citizen must accept or agree to the arrangement:

- to satisfy a work-related visa requirement; or
- to avoid an adverse effect on the non-citizen's immigration status.

70. Subparagraph 245AAB(1)(c) is intended to be objective—that is, it is met if the coercion, or undue influence or undue pressure, to agree to the arrangement would,

objectively assessed, result in a person in the position of the non-citizen believing they had to agree to the arrangement, otherwise they would not be able to satisfy a work-related visa requirement or avoid an adverse effect on their immigration status.

Fault elements

71. New subsection 245AAB(3) provides that, for the purposes of the offence provision in new subsection 245AAB(2), the fault element for paragraphs 245AAB(1)(b) and (c) is knowledge or recklessness by the first person.

72. By expressly providing that the fault elements in relation to the physical elements in new paragraphs 245AAA(1)(b) and (c) 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.

73. The purpose of this subsection is to prevent the prosecution from having to prove that the defendant intended to cause the non-citizen to believe that the non-citizen must accept or agree to the arrangement (identified in new paragraph 245AAB(1)(a)) in order to satisfy a work-related visa requirement or to avoid an adverse effect on the non-citizen's immigration status. Without this provision, proof of this element to the required standard could be difficult in cases where the defendant has been wilfully blind or recklessly indifferent as to the potential consequences for the non-citizen.

74. It is intended that paragraph 245AAB(1)(c) would be met if the coercion, undue influence or undue pressure to agree to the arrangement would, objectively assessed, result in a person in the position of the non-citizen believing they had to agree to the arrangement, otherwise they would not be able to satisfy a work-related visa requirement, or alternatively avoid an adverse impact on their immigration status.

75. Relevantly, new subsection 245AAB(3) does not specify a fault element for the physical element in new paragraph 245AAB(1)(a). Current subsection 5.6(1) of the *Criminal Code* therefore provides that intention applies as the default fault element in relation to this paragraph. This would require the prosecution to prove the defendant engaged in conduct of an illegitimate nature intended to lead the non-citizen to agree to the work arrangement. For clarity, it is not intended for the prosecution to be required to prove a link between the conduct by the first person under new paragraph 245AAB(1)(a) and knowledge or recklessness by the first person as to the matters covered by paragraph 245AAB(1)(c). These are separate elements of the conduct rule.

76. Section 5.3 of the *Criminal Code* provides that a person has knowledge of a circumstance or a result if they are aware that it exists or will exist in the ordinary course of events.

77. Subsection 5.4(1) of the *Criminal Code* provides that a person is reckless with respect to a circumstance if:

- they are aware of a substantial risk that the circumstance exists or will exist; and

- having regard to the circumstances known to that person, it is unjustifiable to take the risk.

78. Subsection 5.4(2) of the *Criminal Code* provides that a person is reckless with respect to a result if:

- they are aware of a substantial risk that the result will occur; and
- having regard to the circumstances known to that person, it is unjustifiable to take the risk.

General defences under the Criminal Code

79. As they have not been excluded, the general defences in Chapter 2 of the *Criminal Code* will apply in relation to this offence.

Civil penalty provision

80. New subsection 245AAB(4) provides that a person is liable to a civil penalty of 240 penalty units if the person contravenes subsection 245AAB(1).

81. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty units in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

82. This penalty must also be read with current paragraph 486R(5)(a) of the Migration Act. Paragraph 486R(5)(a) 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.

83. This penalty must also be read with current 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.

84. A note immediately below new subsection 245AAA(4) draws the reader's attention to current section 486ZF of the Migration Act. 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 of the Migration Act (other than current subsection 245AK(2)).

85. The effect of this note is to clarify that it is sufficient to establish that a person contravened new subsection 245AAB(1).

86. This is distinguishable from the requirement to prove knowledge or recklessness by the first person in relation to new paragraphs 245AAB(1)(b) and (c) in criminal proceedings.

87. A person is liable to a civil penalty under new subsection 245AAB(4) without knowing or being reckless as to the matters covered by new paragraph 245AAB(1)(c). The application of non-fault civil penalties in Subdivision C reflects the Government's

determination to address the problem of illegal work hire practices and exploitation of migrant workers.

88. 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 subsection 245AAB(1) is liable to a civil penalty of this order. The civil penalty in subsection 245AAB(4) sits alongside the offence in subsection 245AAB(2), and reflects the serious character 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***, as amended by the items in Part 4 of the Schedule to the Bill. As well as providing an effective deterrent, it is appropriate that a person who contravenes subsection 245AAB(1) should be liable to a substantial penalty in relation to that contravention.

The conduct rule provision

89. New subsection 245AAB(4) relies on the ***conduct rule provision*** in current section 245AL of Subdivision C. The purpose of the conduct rule provision is to ensure that references to a contravention of a civil penalty provision in Subdivision C of Division 12 of Part 2 of the Migration Act pick up a contravention of the relevant conduct rule provision.

90. Subsection 245AL(1) applies to those provisions that state a person is liable to a civil penalty if they contravene another provision of Subdivision C. The effect of subsection 245AL(2) is that, if a person contravenes the provision that states that a person contravenes that section if they do a certain act, the person is taken to contravene the associated civil penalty provision and so is liable for a civil penalty.

91. For example, the effect of subsection 245AL(2) is that if a person contravenes subsection 245AAB(1), they are taken to have contravened subsection 245AAB(4) (the civil penalty provision), and so are liable to a civil penalty. In the absence of section 245AL, the person would not be liable to a civil penalty in this situation because subsection 245AAB(4) cannot be contravened in its own right.

Meaning of 'work-related visa requirement'

92. New subsection 245AAB(5) provides that a ***work-related visa requirement***, in relation to a non-citizen, means a requirement under this Act or the regulations for the non-citizen to provide, in connection with a visa held by the non-citizen or an application by the non-citizen for a visa, information or evidence about work the non-citizen has undertaken in Australia.

New subsection 245AAB(5) and subparagraph 245AAB(1)(c)(i) – illustrative example

A working holiday visa holder may be eligible for grant of a second working holiday visa if the Minister is satisfied the applicant has carried out a period (or periods) of specified work as the holder of their initial working holiday visa (and where the applicant also satisfies other relevant criteria for grant of the visa).

In these circumstances, the visa applicant is dependent on their employer(s) for evidence to support assessment of this criterion, such as pay slips or a completed employment verification form signed by the employer.

Under departmental policy, for the purposes of a further working holiday visa application, acceptable evidence of specified work would be:

- original or certified copies of pay slips; or

- a completed employment verification form (form 1263) signed by the employer.

As such, pay slips or a completed employment verification form would be material to whether the Minister is satisfied that the visa applicant has carried out the relevant period(s) of specified work.

If an employer were to withhold pay slips or refuse to sign form 1263 for a non-citizen employee, unless the employee agreed to work for less than the minimum wage, this may give rise to a contravention of subsection 245AAB(1) by the employer, in relation to subparagraph 245AAB(1)(c)(i).

Item 5 Subsection 245AN(3)

93. This item makes a consequential amendment to current subsection 245AN(3) to include new sections 245AAA and 245AAB, alongside current sections 245AB and 245AC. As amended, subsection 245AN(3) provides that when on a trial for an offence against section 245AD, the trier of fact may find the defendant not guilty of that offence but guilty of an offence against current section 245AB or 245AC, or new section 245AAA or 245AAB, if:

- the trier of fact is not satisfied that the defendant is guilty of an offence against section 245AD; and

- the trier of fact is satisfied that the defendant is guilty of an offence against section 245AB, 245AC, 245AAA or 245AAB; and

- the defendant has been accorded procedural fairness in relation to that finding of guilt.

94. The purpose of this provision is to ensure that a defendant who is charged with the aggravated offence in section 245AD and is not found guilty of that offence but is found guilty of the baseline offence in current section 245AB or 245AC, or new section 245AAA or 245AAB, can nevertheless be convicted of the relevant baseline offence, provided the defendant has been given an opportunity to be heard in relation to that finding of guilt.

Item 6 Subsection 245AN(4)

95. This item makes a consequential amendment to subsection 245AN(4) to include new sections 245AAA and 245AAB, alongside current sections section 245AE or 245AEA. As amended, subsection 245AN(4) provides that on a trial for an offence against section 245AEB, the trier of fact may find the defendant not guilty of that offence but guilty of an offence against current section 245AB or 245AC, or new section 245AAA or 245AAB, if:

- the trier of fact is not satisfied that the defendant is guilty of an offence against section 245AEB; and

- the trier of fact is satisfied that the defendant is guilty of an offence against section 245AE, 245AEA, 245AAA or 245AAB; and

- the defendant has been accorded procedural fairness in relation to that finding of guilt.

96. The purpose of this provision is to ensure that a defendant who is charged with the aggravated offence in section 245AEB and is not found guilty of that offence but is found guilty of the baseline offence in current section 245AE or 245AEA, or new section 245AAA or 245AAB, can nevertheless be convicted of the relevant baseline offence, provided the defendant has been given an opportunity to be heard in relation to that finding of guilt.

Part 2 Prohibition on certain employers allowing additional non-citizens to work

Division 1 Amendments

Migration Act 1958

Item 7 Subsection 5(1)

97. This item amends subsection 5(1) of the Migration Act to insert new defined terms. The insertion of these terms supports new Subdivision E of Division 12 of Part 2 of the Migration Act, as inserted by item 9 in this Part of the Schedule to the Bill. The new defined terms include ***ABN***, ***migrant worker sanction***, ***prohibited employer***, ***remuneration-related contravention***, ***work-related offence*** and ***work-related provision***.

98. The new defined term ***ABN*** has the same meaning in the Migration Act as in the *A New Tax System (Australian Business Number) Act 1999*. Section 41 of that Act currently provides that the term ABN, for an entity, means the entity's Australian Business Number as shown in the Australian Business Register. The term entity in that Act has the meaning given by section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

99. The term ***ABN*** is relevant to new section 245AYI in new Subdivision E. Subject to the exception in subsection 245AYI(2), subsection 245AYI(1) requires the Minister to publish certain information in relation to a person who is a ***prohibited employer*** on the Department's website. The required information is set out in subsection 245AYI(3), and includes the prohibited employer's ***ABN***, if they have one. New section 245AYI is described in more detail below.

100. The new defined term ***migrant worker sanction*** is a signpost definition, providing that the term has the meaning given by section 245AYD of the Migration Act (described further below).

101. The new defined term ***prohibited employer*** is a signpost definition, providing that the term has the meaning given by new section 245AYB of the Migration Act (described further below).

102. The new defined term ***remuneration-related contravention*** is a signpost definition, providing that the term has the meaning given by new section 245AYF of the Migration Act in relation to a civil remedy provision of the Fair Work Act (described further below).

103. The new defined term ***work-related offence*** means:

- an offence against Subdivision C 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 that Subdivision; or
- an ancillary offence (within the meaning of the *Criminal Code*) that is, or relates to, an offence against that Subdivision.

104. Prior to the commencement of the amendments by the items in the Schedule to the Bill, the term ***work-related offence*** was 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***.

105. The effect of the amendment by item 7, together with the amendment by item 10, is to move the current definition of ***work-related offence*** from section 487A to subsection 5(1). The amendment by item 7 adopts the current definition in section 487A, and, by inserting it in subsection 5(1), ensures that the term has a consistent meaning across the Migration Act, unless a contrary intention appears in a specific provision. This ensures that where new Subdivision E relies on the term ***work-related offence***, particularly in relation to new section 245AYD and the defined term ***migrant worker sanction***, it has the same meaning as in Part 8E of the Migration Act.

106. The related amendment by item 10 to current section 487A is dealt with below.

The meaning of 'work-related provision'

107. As amended, subsection 5(1) of the Migration Act provides that, unless the contrary intention applies, the term ***work-related provision*** means a civil penalty provision in Subdivision C or E of Division 12 of Part 2 of the Migration Act.

108. Prior to the commencement of the amendments by the items in the Schedule to the Bill, the term ***work-related provision*** was 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***.

109. The effect of the amendment by item 7, working together with the amendment by item 10, is to move the current definition of ***work-related provision*** from section 487A to subsection 5(1). The amendment by item 7 adopts the current definition in section 487A, and, by inserting it in subsection 5(1), ensures that the term has a consistent meaning across the provisions of the Migration Act, unless a contrary intention appears in a specific provision. This ensures that where new Subdivision E relies on the term ***work-related provision***, particularly in relation to new section 245AYD and the defined term ***migrant worker sanction***, it has the same meaning as in Part 8E of the Migration Act.

110. The related amendment by item 10 to section 487A is dealt with below.

Item 8 Paragraph 140X(aa)

111. This item amends current paragraph 140X(aa), inserting a reference to new Subdivision E of Division 12 of Part 2 of the Migration Act (as inserted by the amendments by item 9 of this Part). This amendment provides 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 Subdivision C, D or E of Division 12 of Part 2 of the Migration Act.

112. This amendment ensures the investigation of contraventions of the civil penalty provisions in new Subdivision E is included as a purpose for which the powers of an inspector under Subdivision F of Division 3A of Part 2 may be exercised. This is appropriate and necessary, given that a person subject to a bar under 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. It is consistent with the inclusion of current Subdivisions C and D of Division 12 of Part 2 in current paragraph 140X(aa).

Item 9 At the end of Division 12 of Part 2

113. This item inserts a new Subdivision E at the end of Division 12 of Part 2 of the Migration Act. This new Subdivision comprises new sections 245AYA, 245AYB, 245AYC, 245AYD, 245AYE, 245AYF, 245AYG, 245AYH, 245AYI, 245AYJ and 245AYK. These provisions operate collectively to establish a new framework to prohibit certain employers from employing additional non-citizens for a specified period, as well as associated reporting obligations and civil penalty provisions.

Overview

114. New section 245AYA provides an overview and simplified outline of new Subdivision E of Division 12 of Part 2 of the Migration Act. New section 245AYA does not give the authority to prohibit an employer from employing additional non-citizens; instead, section 245AYA provides an outline of the operative provisions in new Subdivision E.

115. New subsection 245AYA(1) states that new Subdivision E sets out the circumstances in which certain persons (called ***prohibited employers***) may be prohibited from allowing additional non-citizens to begin work.

116. New subsection 245AYA(2) sets out the persons who may be declared to be prohibited employers. Under new subsection 245AYG(1), the Minister may declare a person who has become subject to a ***migrant worker sanction*** (within the meaning given by new section 245AYD) to be a prohibited employer.

117. New subsection 245AYA(3) states that the period during which a prohibited employer is subject to a prohibition under new Subdivision E is specified in the declaration. New subsections 245AYG(8) and (9) deal with the commencement and period of effect of the declaration respectively.

118. New subsection 245AYA(4) describes the new prohibition on allowing additional non-citizens to begin work. The prohibition is established by new section 245AYH, and applies where a person is declared to be a prohibited employer under new section 245AYG. New section 245AYH is a civil penalty provision.

119. New subsection 245AYA(5) notes that a person who ceases to be a prohibited employer may allow additional non-citizens to begin work, but is subject to additional reporting obligations for a period of 12 months after ceasing to be a prohibited employer. These additional reporting obligations are established in new section 245AYJ, which is also a civil penalty provision.

Meaning of 'prohibited employer'

120. New section 245AYB provides that a person is a ***prohibited employer*** if the person is declared by the Minister to be a prohibited employer under subsection 245AYD(1). This provision establishes a signpost definition of ***prohibited employer*** for the purposes of new Subdivision E of Division 12 of Part 2 of the Migration Act. This expression has the meaning given by new section 245AYD.

Meaning of 'work' and 'allows' to work

121. New section 245AYC defines ***work*** for the purposes of new Subdivision E, and sets out the circumstances in which a person ***allows*** a non-citizen to work.

122. New subsection 245AYC(1) defines ***work***, for the purposes of the new Subdivision, to mean any work, whether for reward or otherwise. This 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. 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.

123. New subsection 245AYC(2) defines the circumstances in which a person ***allows*** another person to ***work*** for the purposes of the new Subdivision. 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.

124. New paragraph 245AYC(2)(a) provides that a person ***allows*** a non-citizen to work if the person employs the non-citizen under a contract of service. 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.

125. New paragraph 25AYC(2)(b) provides that a person ***allows*** a non-citizen to work if the person engages the second person under a contract for services (other than in a domestic context). 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.

126. This paragraph intentionally excludes contracts for services in a domestic context from the meaning of ***allows*** given by paragraph 245AYC(2)(b). The amendments by the items in this Part are not intended to prevent an individual from engaging the services of contractors at their home, such as plumbers, electricians or cleaners. The 'domestic context' exclusion in this paragraph is therefore intended to ensure that an individual who is a ***prohibited employer*** is still able to engage, in relation to their household (domestic context),

an independent contractor who is a non-citizen. This exclusion is particularly relevant to new sections 245AYH and 245AYJ, described further below.

127. Importantly, the reference to 'domestic context' in this paragraph is not intended to exclude general domestic activities or services, in a commercial context, from the meaning of ***allows***. For example, the prohibition in new subsection 245AYH is intended to apply where the business operated by a prohibited employer is a cleaning business offering domestic cleaning services. The 'domestic context' exclusion is only relevant here to the prohibited employer's own household. The exclusion does not cover circumstances in which the prohibited employer allows a non-citizen to work as a cleaner in another household, as part of that prohibited employer's cleaning business.

128. Persons who engage non-citizens as independent contractors in a domestic context are excluded because of the short-term basis of the relationship (unlike employment) and the limited capacity of householders to check the work entitlements of non-citizens.

129. New paragraph 245AYC(2)(c) provides that a person allows a non-citizen to work if the person participates 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.

130. 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.

131. New paragraph 245AYC(d) provides that a person allows a non-citizen to work if the person bails or licenses 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.

132. This paragraph is intentionally limited to transportation services. The amendments are intended to only affect taxi companies and other chauffeured car hire services. It is not intended to apply to car rental agencies.

133. 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 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.

134. This paragraph also allows for the situation in which the owner of a taxi bails or licenses a taxi to a person who is not the driver. In these circumstances, if the owner intends that the driver will drive the taxi, the owner will allow the driver to work, despite the fact that the contractual relationship is between the owner and another person.

135. New paragraph 245AYC(e) provides that a person allows a non-citizen to work if the person leases or licences premises, or a space within premises, to the non-citizen, or

another person, with the intention that the person will use the premises or space to perform sexual services within the meaning of the *Criminal Code*.

136. 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(e) is designed to capture brothel owners who claim to be merely renting rooms to their sex workers instead of providing employment.

137. New paragraph 245AYC(2)(f) creates a regulation-making power to allow for the Migration Regulations to prescribe any new forms of work arrangements that may emerge with the intention of attempting to circumvent the scope of the meaning given to the expression ***allows*** to work by new subsection 245AYC(2).

138. This provision mirrors current paragraph 245AG(2)(e) in Subdivision C. It provides flexibility to prescribe other situations in which a person will be ***allowed to work*** to specifically cover these new employment relationships.

139. New subsection 245AYC(3) provides that, for the purposes of new paragraph 245AYC(2)(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 work as defined in new paragraph 245AYC(2)(e) 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(2)(e).

Meaning of 'migrant worker sanction'

140. New section 245AYD establishes the meaning of ***migrant worker sanction*** for the purposes of new Subdivision E. A person may only be declared to be a ***prohibited employer*** under new subsection 245AYG(1) if that person has become subject to a migrant worker sanction.

141. New section 245AYD provides that there are four circumstances in which a person may be subject to a migrant worker sanction:

- if the person is an approved work sponsor who is subject to a bar imposed under current paragraph 140M(1)(c) or (d) of the Migration Act: new paragraph 245AYD(a);

- if the person is convicted of a ***work-related offence***: new paragraph 245AYD(b);

- if the person is the subject of a civil penalty order in relation to the contravention of a ***work-related provision***: new paragraph 245AYD(c); or

- if the person is the subject of an order made for contravention of a relevant civil remedy provision of the Fair Work Act (as set out in a table covered by new section 245AYE): new paragraph 245AYD(d).

142. Importantly, a person who is the subject of an order made under the Fair Work Act for contravention of a civil remedy provision of that Act is only subject to a migrant worker sanction if both:

- the order is made for contravention of a civil remedy provision covered by new section 245AYE: new subparagraph 245AYD(d)(i); and

- the contravention is in relation to an employee who is a non-citizen: new subparagraph 245AYD(d)(ii).

Migrant worker sanctions – Fair Work Act 2009

143. New section 245AYE sets out the civil remedy provisions of the Fair Work Act that are relevant for the purposes of new subparagraph 245AYD(d)(i) of the Migration Act.

144. New section 245AYE covers a table that sets out 18 items. Each table item corresponds to a civil remedy provision of the Fair Work Act. Column 1 identifies the subject of the provision. Column 2 provides the corresponding section or subsection reference for that provision as it appears in the Fair Work Act.

145. Column 3 of the table mentions the kind of contravention of the provision identified in columns 1 and 2. The information in column 3 then identifies the kind of contravention, in relation to the provision mentioned in the same row in columns 1 and 2, that constitutes a contravention of a civil remedy provision for the purposes of new subparagraph 245AYD(d)(i), for the meaning of ***migrant worker sanction***.

146. There are two kinds of contravention identified in column 3. Where column 3 mentions 'any contravention', the effect of this is that any contravention of the corresponding provision identified in columns 1 and 2 of that same row is a contravention of a civil remedy provision for the purposes of new subparagraph 245AYD(d)(i).

147. Where column 3 mentions 'a remuneration-related contravention', the effect is to limit the contraventions of the corresponding provision identified in columns 1 and 2, so that only remuneration-related contraventions of that provision are relevant for the purposes of new subparagraph 245AYD(i).

148. The meaning of ***remuneration-related contravention***, in relation to a civil remedy provision of the Fair Work Act, is established by new section 245AYF.

149. Where any contravention of a provision mentioned in columns 1 and 2 is a contravention for the purposes of subparagraph 245AYD(d)(i), this is either because the provision is inherently remuneration-related (for example, subsection 323(1) of the Fair Work Act – method and frequency of payment), or because the provision often relates to underpayments or the exploitation of employees in some way (for example, sham contracting or failure to keep proper employment records).

Meaning of 'remuneration-related contravention'

150. New section 245AYF establishes the meaning of the term ***remuneration-related contravention***, in relation to a civil remedy provision of the Fair Work Act, for the purposes of new section 245AYE. Where the term ***remuneration-related contravention*** appears in a

row in the table covered by section 245AYE, its purpose is to limit contraventions of the civil remedy provision mentioned in that row.

151. In this way, only a ***remuneration-related contravention*** of that civil remedy provision is relevant for the purposes of subparagraph 245AYD(d)(i). Paragraphs 245AYF(a) to (d) set out the circumstances or characteristics that would make a contravention of one of the provisions identified at table items 1 to 4 in the table under section 245AYE to be remuneration-related – that is, where the contravention is related to one or more of the following:

- the underpayment of wages, or other monetary entitlements of employees;
- the unreasonable deduction of amounts from amounts owed to employees;
- the placing of unreasonable requirements on employees to spend or pay amounts paid, or payable, to employees;
- the method or frequency of amounts payable to employees in relation to the performance of work.

Declaration of person as a prohibited employer

152. New section 245AYG 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.

153. New subsection 245AYG(1) provides that the Minister may declare a person to be a ***prohibited employer***, where that person is covered by new subsection 245AYD(4). The declaration must be in writing.

154. If the Minister makes a declaration under subsection 245AYG(1) that a person is a prohibited employer, the Minister may also revoke that declaration. Subsection 33(3) of the Acts Interpretation Act relevantly provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

155. New subsection 245AYG(2) provides that a declaration must not be made under new subsection 245AYG(1) after the end of the five-year period starting on the day the person first became subject to the migrant worker sanction.

156. A note below this subsection provides that if a person is subject to more than one migrant worker sanction, the five-year period is separate for each sanction. This makes clear that if a person has, for example, been the subject of multiple civil penalty orders, over several years, in relation to contravention of work-related provisions of the Migration Act, there is a separate 5-year period in relation to each order. Even if the five-year period has elapsed for the earliest of these orders, a declaration could still be made under subsection 245AYG(1) where the person is also the subject of a more recent order.

157. New subsection 245AYG(3) provides that a declaration made under subsection 245AYG(1) is not a legislative instrument. This provision is included to assist the reader, as a declaration made in writing under subsection 245AYG(1) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act.

158. New subsection 245AYG(4) 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.

159. New subsection 245AYG(5) establishes the period within which the person is to make a written submission to the Minister, when invited to do so under paragraph 245AYG(4)(b). Unless a longer period is stated in the notice given under subsection 245AYG(4), the period ends 28 days after the day the person is given notice by the Minister.

160. New subsection 245AYG(6) 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 under subsection 245AYG(4), so long as it is received by the Minister within the period covered by subsection 245AYG(5); and

- any criteria prescribed by the regulations for the purposes of paragraph 245AYG(6)(b).

161. Where criteria are prescribed by the Migration Regulations for the purposes of paragraph 245AYG(6)(b), the Minister must consider these criteria in making a decision to declare a person to be a prohibited employer. Without limiting the criteria that may be prescribed, such criteria might relate to matters such as:

- 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 under new subsection 245AYH;

- 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).

162. By providing for the criteria to be prescribed by the Migration Regulations, this ensures appropriate flexibility to review and adjust the criteria from time to time, while also ensuring that there is appropriate parliamentary oversight, including through the Senate Standing Committee for the Scrutiny of Delegated Legislation.

163. New subsection 245AYG(7) 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. This provision aligns with APP 6.5. Relevantly, the Department has commissioned a Privacy Impact Assessment to support the implementation of these amendments, and to ensure that privacy considerations are addressed appropriately. The

recommendations of this assessment will be considered, and actioned where appropriate, in the context of implementation.

164. New subsection 245AYG(8) 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.

165. New subsection 245AYG(9) provides that the declaration has effect during the period specified in the declaration (unless sooner revoked).

166. 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 245AYG(4) may also be taken into account in determining the declaration's period of effect.

167. For example, an approved work sponsor who is subject to a bar under paragraph 140M(1)(c) or (d) would also be subject to a ***migrant worker sanction***. If this person is declared to be a prohibited employer, it may be considered appropriate that the declaration made under subsection 245AYG(1) has effect for the same period as the bar. Where the person is subject to a migrant worker sanction because the person has been convicted of a work-related offence, the Minister may consider it appropriate, having regard to the circumstances of the case, for the declaration to specify that it is in effect for a longer period, such as two years. Where the nature of the offending is particularly serious, the declaration may specify a significantly longer period. It is important that the provision is open in relation to the period of effect of the declaration; this flexibility is necessary to ensure the period appropriately reflects the circumstances, and severity, of the individual case.

168. New subsection 245AYG(10) provides that applications may be made to the AAT for review of a decision under subsection 245AYG(1) to declare a person to be a prohibited employer.

169. A note immediately below subsection 245AYG(10) provides that section 27A of 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 subsection 245AYG(7). Having regard to 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

170. New section 245AYH establishes the prohibition on allowing additional non-citizens to begin work.

171. New subsection 245AYH(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.

172. The prohibition does not apply where the non-citizen referred to in subparagraph 245AYH(1)(b)(i) or (ii) holds a ***permanent visa*** (which has the meaning given by current subsection 30(1) of the Migration Act). New paragraph 245AYH(1)(c) provides that a person who is a prohibited employer would contravene this subsection if the non-citizen referred to in subparagraph 245AYH(1)(b)(i) or (ii) is either:

- a non-citizen who does not hold a visa; or

- a non-citizen who holds a visa other than a permanent visa.

173. The purpose of new subsection 245AYH(1) is to prevent a person who is a prohibited employer from allowing additional non-citizens to begin work. This provision relies on the meaning of ***work*** and ***allows to work*** provided by new section 245AYC for the purposes of new Subdivision E.

174. For clarity, the intention of this provision is not 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 be allowed to work. The inclusion of the word 'begin' in subparagraphs 245AYH(1)(b)(i) and (ii) is intended to provide that the person would only contravene subsection 245AYH(1) where the non-citizen mentioned in either subparagraph 245AYH(1)(b)(i) or (ii) has not previously been allowed to work by the person, prior to that person being declared by the Minister to be a prohibited employer under new subsection 245AYG(1).

New subsection 245AYH(1) – illustrative examples

Employer A3 is the subject of a court order to pay a pecuniary penalty for contravention of a work-related provision of the Migration Act. Person D is the owner/director of Employer A3, and is also the subject of a court order for contravention of the work-related provision in current section 245AK of the Migration Act (civil liability of executive officers of bodies corporate).

Employer A3 and Person D are subsequently considered for declaration as prohibited employers under subsection 245AYG(1).

Following consideration, the Minister makes a declaration under subsection 245AYG(1) in relation to both Employer A3 and Person D. The declaration comes into effect on 1 July 2022, and is specified to have effect for a period of 12 months from that day, in relation to both Employer A3 and Person D.

Pre-existing work relationship

Person B1 is a student visa holder. Person B1 began working for Employer A3 on 1 October 2021, on a casual basis, and is still working for Employer A3 when the prohibited employer declaration comes into effect on 1 July 2022.

Employer A3 does not contravene subsection 245AYH(1) by continuing to allow Person B1 to work.

No pre-existing work relationship

Person B2 is a working holiday visa holder. On 25 June 2022, Person B2 responds to an advertisement by Employer A3 for casual work. Person B2 has not previously worked for Employer A3.

Employer A3 interviews Person B2 on 5 July 2022, and offers Person B2 the job.

The prohibited employer declaration in relation to Employer A3 came into effect on 1 July 2022. If Employer A3 allows Person B2 to begin work, Employer A3 would contravene subsection 245AYH(1).

The prohibited employer is an individual

In addition to being the owner/director of Employer A3, Person D also works in a management position in a labour hire company, LHC1. In this role, Person D would ordinarily be involved in reviewing and signing off on all recruitment and work referrals.

While Person D, as an individual, is a prohibited employer, LHC1 has not been declared to be a prohibited employer.

For the period of 12 months from 1 July 2022, if Person D were to be involved in allowing any non-citizens to begin work through Person D's role in LHC1, Person D would contravene subsection 245AYH(1).

Person D's status as a prohibited employer does not prevent LHC1 from allowing additional non-citizens to begin work – but as a prohibited employer, Person D must not have a role in deciding to allow a non-citizen to begin work (excluding permanent visa holders).

175. New subsection 245AYH(2) provides that subsection 245AYH(1) does not apply in relation to work that a non-citizen is allowed to do if the work is merely incidental to a business of the person or the body corporate.

176. The purpose of this subsection is to provide a limited exception to the prohibition in relation to allowing additional non-citizens to begin work. Where the nature of the work that a prohibited employer allows a non-citizen to carry out is incidental to the prohibited employer's business – and not part of the prohibited employer's core business or services – the prohibited employer would not be in contravention of subsection 245AYH by allowing that non-citizen to begin work.

177. This exception is intended to cover circumstances where a person may have limited choice but to engage the services of a non-citizen temporarily or on an ad hoc basis as an

independent contractor – for example, to undertake repairs at the prohibited employer's business premises, or to provide occasional catering services for meetings and events. It is not the intention that new section 245AYH would impede a person's capacity to contract for such services during the period that a prohibited employer declaration is in effect in relation to that person, particularly where repairs may be necessary to address work health and safety issues at a work site, or to provide necessary maintenance or related services.

178. Where the prohibited employer can demonstrate that the work is incidental to the business of the prohibited employer, the exception in new subsection 245AYH(2) would be available, such that subsection 245AYH(1) would not apply. Current section 96 of the Regulatory Powers Act relevantly provides that in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, if the person wishes to rely on any exception provided by the law creating the civil penalty provision, then the person bears an evidential burden in relation to that matter.

New subsection 245AYH(2) – illustrative example

Employer C1 (a body corporate) owns and operates a mushroom processing plant. Following an investigation by the ABF, Employer C1 is found to have employed a large number of visitor visa holders and unlawful non-citizens in the plant, over several years.

Court proceedings against Employer C1 are initiated, and the court makes pecuniary penalty orders for multiple contraventions of work-related provisions under the Migration Act.

Following this, Employer C1 is referred to the Minister for consideration under section 245AYG, to be declared a prohibited employer. The Minister subsequently declares Employer C1 to be a prohibited employer for a period of two years.

Six months into the period of effect of the declaration, the mushroom processing plant experiences electrical issues. Employer C1 is required to close the plant temporarily for work health and safety reasons, until the issues are resolved.

Employer C1 engages the services of a local electrician to inspect and repair the plant's electrical wiring urgently. The electrician is a temporary visa holder.

Employer C1's status as a prohibited employer does not prevent Employer C1 from engaging the services of the electrician, in spite of the prohibition in section 245AYH. Although the electrician holds a temporary visa, as an ad hoc arrangement where the nature of the work can be characterised as incidental to Employer C1's business, this arrangement between Employer C1 and the electrician constitutes an exception to the civil penalty in section 245AYH.

Employer C1 subsequently advertises several vacancies at the plant. A group of six backpackers respond to the advertisement. They indicate to Employer C1 that they all have their own ABNs, and hold working holiday visas. Employer C1 offers to engage them all on six-month contracts for services to work at the plant, performing a range of duties consistent with the duties of current employees. All six accept the offer, and commence working at the plant.

This action by Employer C1 contravenes the prohibition in subsection 245AYH(1). The exception that applied in relation to Employer C1's engagement of the electrician does not apply in these circumstances. Where the six working holiday visa holders are performing work with duties that are consistent with, or comparable to, the duties of employees of the business, the work would not be characterised as 'merely incidental' to Employer C1's business.

179. New subsection 245AYH(3) provides that a person who contravenes subsection 245AYH(1) is liable to a civil penalty of 240 penalty units. A note under new paragraph 245AYG(1)(c) draws the reader's attention to 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.

180. The AGD Framing Guide has been considered in relation to this provision, and particularly in relation to the penalty. While subsection 245AYH(3) is a civil penalty provision, it is appropriate that a person who contravenes subsection 245AYH(1) is liable to a penalty of 240 penalty units. This penalty aligns with the increased penalties for the current ***work-related provisions***, as amended by the items in Part 4 of the Schedule to the Bill. It also acknowledges the serious character of the 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 245AYH(1) as a prohibited employer, should be liable to a substantial penalty in relation to that contravention.

Publishing information about prohibited employers

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

182. New subsection 245AYI(1) provides that if a person is a prohibited employer, the Minister must publish the information required by new subsection 245AYI(3) on the Department's website. The purpose of publishing this information is to put the Australian community, and prospective migrant workers in particular, on notice that the person is a prohibited employer, and is subject to the prohibition under new section 245AYH. It will also serve as a further deterrent against committing a work-related offence or contravening a work-related provision of the Migration Act.

183. New subsection 245AYI(2) provides for an exception to the requirement in subsection 245AYI(1), in circumstances prescribed by regulations made for the purposes of subsection 245AYI(2).

184. New subsection 245AYI(3) sets out the information that is required to be published by subsection 245AYI(1). This includes:

- the name of the prohibited employer; and
- the ABN of the prohibited employer (if they have an ABN); and
- any other information that the Minister considers is reasonably necessary to identify the prohibited employer; and

- a brief summary of the migrant worker sanction that is the basis of the person's declaration as a prohibited employer; and

- the period during which the person is a prohibited employer.

185. New subsection 245AYI(4) provides that subsection 245AYI(1) authorises the publication of personal information, constituting an 'authorised by law' exemption to APP 6 (enlivening the exception in APP 6.2(b)). Relevantly, the Department has commissioned a Privacy Impact Assessment to support the implementation of these amendments, and to ensure that privacy considerations are addressed appropriately. The recommendations of this assessment will be considered, and actioned where appropriate, in the context of implementation.

186. New subsection 245AYI(5) provides that no civil liability arises from action taken by the Minister in good faith in publishing information under subsection 245AYI(1).

187. New subsection 245AYI(6) 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 subsection 245AYI(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.

188. 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.

Prohibited employers – additional reporting obligations

189. New section 245AYJ establishes reporting obligations on a person who was previously a prohibited employer.

190. New subsection 245AYJ(1) establishes that a person contravenes this subsection if:

- the person was, but no longer is, a prohibited employer;

- within the period of 12 months starting on the day after the person stopped being a prohibited employer, the person starts to employ a non-citizen (other than a non-citizen who holds a permanent visa);

- the person does not give the Department, in writing, information required by new subsection 245AYJ(3), before the end of the 28-day period starting on the day after the person allows the non-citizen to begin work.

191. A person who contravenes this subsection 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 245AYJ(1)(c) draws the reader's attention to this provision.

192. The purpose of this subsection is to establish that former prohibited employers are subject to additional reporting requirements for the duration of the 12-month period after the end of their ***prohibited employer*** status. The effect of this provision is that the former prohibited employer must provide the Department with certain information in relation to any non-citizens that they employ within the 12-month period. This requirement does not apply in relation to non-citizens who hold a ***permanent visa***, within the meaning given by subsection 30(1) of the Migration Act.

193. New subsection 245AYJ(2) provides that new subsection 245AYJ(1) does not apply in relation to work that the non-citizen is allowed to do if the work is merely incidental to a business of the person.

194. The purpose of this subsection is to provide a limited exception to the civil penalty provision in new subsection 245AYJ(1), specifically in relation to work that a non-citizen is allowed to do by a former prohibited employer, where that work is merely incidental to a business of the former prohibited employer. This mirrors the exception under new subsection 245AYH(2) in relation to the prohibition on a prohibited employer allowing an additional non-citizen to begin work. Where the nature of the work that a former prohibited employer allows a non-citizen to carry out is incidental to that person's business, it is not intended that the former prohibited employer should be required to provide information to the Department in relation to that non-citizen.

195. Where the former prohibited employer can demonstrate that the work is incidental to the business of the prohibited employer, the exception in new subsection 245AYJ(2) would be available, such that subsection 245AYJ(1) would not apply. Current section 96 of the Regulatory Powers Act relevantly provides that in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, if the person wishes to rely on any exception provided by the law creating the civil penalty provision, then the person bears an evidential burden in relation to that matter.

196. New subsection 245AYJ(3) establishes the information required for the purposes of new paragraph 245AYG(1)(c). The following information is required:

- the name of the non-citizen: new paragraph 245AYJ(3)(a);
- a description of the work the non-citizen is allowed to do: new paragraph 245AYJ(3)(b);
- if the non-citizen holds a visa that is subject to a work-related condition, details of the condition: new paragraph 245AYJ(3)(c);
- any other information prescribed by regulations made for the purposes of this paragraph: new paragraph 245AYJ(3)(d).

197. New subsection 245AYJ(4) provides that for the purposes of paragraph 245AYJ(3)(d), personal information may be prescribed only to the extent that it is reasonably necessary for monitoring compliance with this Division.

198. The intention of this provision is to limit the scope of personal information that may be prescribed in the Migration 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 245AYJ(3)(d). 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 (as it relates to the prohibition in new section 245AYH, and particularly subparagraph 245AYH(1)(b)(ii)). Relevantly, the Department has commissioned a Privacy Impact Assessment to support the implementation of these amendments, and to ensure that privacy considerations are addressed appropriately. The recommendations of this assessment will be considered, and actioned where appropriate, in the context of implementation.

199. The reference to Division 12 of Part 2 of the Migration Act in subsection 245AYJ(4) is deliberate, in order to cover monitoring of compliance with Subdivision C as well, particularly in consideration of the relationship between the work-related offences and work-related provisions in Subdivision C and new Subdivision E.

Exhaustive statement of natural justice hearing rule

200. New section 245AYK provides an exhaustive statement of the natural justice hearing rule for the purposes of new Subdivision E of Division 12 of Part 2 of the Migration Act.

201. New subsection 245AYK(1) provides that new Subdivision E is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

202. New subsection 245AYK(2) provides that sections 494A to 494D, in so far as they relate to new Subdivision E, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with, across the Subdivision. These sections deal with giving documents, by the Minister, to a person, and when a person is taken to have received a document from the Minister.

203. The purpose of this amendment is to provide a clear legislative statement that the provisions in new Subdivision E are an exhaustive and comprehensive statement of the of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Item 10 Section 487A (definitions of work-related offence and work-related provision)

204. 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, related to the amendment by item 7 of this Part.

205. 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

Item 11 Application of amendments

206. This item provides that the amendments of the Migration Act made by this Part apply in relation to ***migrant worker sanctions*** to which a person becomes subject on or after the commencement of this Schedule. The conduct leading to the sanction may occur before, on or after the commencement of this Schedule.

207. This provision ensures that a declaration can only be made in relation to a person where the relevant migrant worker sanction occurs on or after commencement of the amendments of the Migration Act. This acknowledges the significant effect of the declaration, if made, but balances this against the fact that the ***migrant worker sanctions*** are well-established, and include long-standing offences and civil penalty or civil remedy provisions under the Migration Act and the Fair Work Act.

208. The prohibited employer declaration and the related prohibition and reporting requirements under new Subdivision E are intended to reinforce the Government's strong stance against illegal work practices and the exploitation of migrant workers.

Part 3 Use of computer system to verify immigration status

Division 1 Amendments

Migration Act 1958

Item 12 Subsection 5(1)

209. This item inserts several new signpost definitions in subsection 5(1) of the Migration Act.

210. The expression ***logging into***, and the terms ***prescribed computer system*** and ***required permission***, are defined in new section 245APE for the purposes of Subdivision C of Division 12 of Part 2. The meaning of ***required system user*** is given by new section 245APB, in relation to the use of the ***prescribed computer system*** for the purposes of Subdivision C of Division 12 of Part 2.

211. The insertion of these signpost definitions in current subsection 5(1) of the Migration Act supports the amendments, by items 13 to 20 in this Part, of current Subdivision C of Division 12 of Part 2 of the Migration Act. The signpost definitions direct the reader to the relevant provisions that give each term or expression its meaning for the purposes of Subdivision C of Division 12 of Part 2 of the Migration Act.

Item 13 At the end of subsection 245AA(1)

212. This item inserts new paragraph 245AA(1)(c) at the end of current subsection 245AA(1).

213. Current section 245AA provides an overview of Subdivision C of Division 12 of Part 2 of the Migration Act. The purpose of the amendment by item 13 is to update this overview to include reference to the new civil penalty provisions at new sections 245AEC and 245AED, inserted by item 19 in this Part.

214. New paragraph 245AA(1)(c) provides an outline of the requirements under new sections 245AEC and 245AED in relation to determining whether a non-citizen has the required permission to work, by using information sourced from the prescribed computer system or another prescribed source.

Item 14 At the end of subsection 245AA(2)

215. This item inserts new paragraphs 245AA(2)(d) and (e) at the end of current subsection 245AA(2).

216. As part of the overview of Subdivision C in current section 245AA, subsection 245AA(2) identifies a number of sections of the Migration Act that define terms that are relevant for the purposes of Subdivision C.

217. The purpose of the amendment by item 14 is to update current subsection 245AA(2) to ensure that it includes reference to new defined terms and expressions for the purposes of Subdivision C established by the amendments in this Part.

218. Specifically, the insertion of new paragraphs 245AA(2)(d) and (e) revises the overview of Subdivision C to include reference to new section 245APB, which defines ***required system user***, and new section 245APE, which defines ***logging into***, ***prescribed computer system*** and ***required permission***.

Item 15 Subsection 245AB(2)

219. This item repeals current subsection 245AB(2) and substitutes a new subsection 245AB(2).

220. Current section 245AB deals with allowing an unlawful non-citizen to work. 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.

221. Current subsection 245AB(2) provides an exception to subsection 245AB(1) so that where a person takes reasonable steps at reasonable times to verify that the worker is not an unlawful non-citizen, the first person would not contravene current subsection 245AB(1). Accordingly, current subsection 245AB(2) provides a specific defence in relation to a contravention of subsection 245AB(1). It operates as a defence to the offence in current subsection 245AB(3), and as an exception to the related civil penalty provision in current subsection 245AB(5).

222. New subsection 245AB(2), which replaces current subsection 245AB(2), recasts the defence to focus on obtaining information from the prescribed computer system, and for the first person to be reasonably satisfied, on the basis of that information, that the worker is not an unlawful non-citizen.

223. New subsection 245AB(2) provides that current subsection 245AB(1) does not apply if the first person is, and continues to be, reasonably satisfied that the worker is not an unlawful non-citizen, on the basis of information obtained:

- by logging into and using the prescribed computer system to source the information; or

- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (unless the first person is a ***required system user*** under new section 245APB); or

- by doing any one or more things prescribed by the regulations.

224. The purpose of new paragraph 245AB(2)(a) is to provide that the defence (or exception) is available if the first person logs into and uses the prescribed computer system to obtain information to satisfy themselves that the worker is not an unlawful non-citizen. New section 245APE relevantly defines the expression ***logging into*** for the purposes of Subdivision C. As defined by section 245APE, a person logs into the prescribed computer system by accessing the system under an account maintained by or for the person.

225. The purpose of new paragraph 245AB(2)(b) is to provide that the defence (or the exception, in relation to the civil penalty in current subsection 245AB(5)) is, alternatively, available to the first person where the information is obtained under an arrangement by which another person logs into and uses the prescribed computer system to source the information.

New paragraph 245AB(2)(b) – illustrative examples

Checks may be "contracted out"

Employer A1 has in excess of 200 active employees at any time, including a large seasonal workforce of non-citizens holding student visas, working holiday visas and various other temporary and permanent visas.

Given the volume and turnover of non-citizen workers, Employer A1 engages the services of another business – Service B1 – to conduct checks of prospective non-citizen workers' details in VEVO (the prescribed computer system).

When hiring a new non-citizen worker, Employer A1 obtains the non-citizen's agreement for the necessary information (name, date of birth, passport details etc) to be provided to Service B1 to conduct a check in VEVO. Service B1 logs into VEVO and conducts the check, and provides the results of that check to Employer A1.

On the basis of this information, Employer A1 may be reasonably satisfied that the new non-citizen worker is not an unlawful non-citizen.

The worker can provide the information

Employer A2 is a small business with fewer than 20 employees. Employer A2 has not registered as an organisation to use VEVO to check non-citizen workers' immigration status and work–related visa conditions.

Employer A2 advertises a new part-time vacancy and identifies a suitable candidate. The candidate indicates they are a non-citizen, and that they hold a student visa.

As Employer A2 has not registered to use VEVO, Employer A2 is unable to log into VEVO to obtain information to be satisfied of the non-citizen's immigration status and work-related conditions. Instead, the candidate offers to log into VEVO directly and initiate a system-generated email, to be sent directly from VEVO to Employer A2's email address.

Employer A2 agrees, and provides an email address to the candidate for this purpose. The candidate logs into VEVO as a visa holder, and generates an auto-generated email to Employer A2's address.

Shortly after this, Employer A2 receives the email from VEVO. It includes information including the candidate's name, date of birth and other details. The email includes information about the candidate's immigration status and work-related conditions, and confirms that the candidate holds a student visa.

On the basis of this information, Employer A2 may be reasonably satisfied that the candidate is not an unlawful non-citizen.

226. Importantly, new paragraph 245AB(2)(b) also provides that the defence is not available under this paragraph if the first person is a ***required system user*** within the meaning given by new section 245APB. If a person is a required system user, the person may not obtain the information by arranging for another person to log into and use the system (as otherwise contemplated by new paragraph 245AB(2)(b)). If a person is a required system user, the new subsection 245AB(2) defence may still be available where the person obtains information by the means specified in either paragraph 245AB(2)(a), or paragraph 245AB(2)(c).

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

228. The defence in new subsection 245AB(2) is available where the first person is, and continues to be, reasonably satisfied that the worker is not an unlawful non-citizen, on the basis of information obtained by any of the means set out at paragraphs 245AB(2)(a), (b) or (c). This is intended to clarify that the defence is not available if information so obtained reasonably indicates that the worker concerned may be an unlawful non-citizen. The requirement that the first person is, and continues to be, reasonably satisfied, is intended to make clear that, in the context of an ongoing arrangement with a non-citizen to allow that non-citizen to work, the first person would be expected to check at reasonable intervals or after receiving information that might raise a potential issue or change in the worker's immigration status.

229. The purpose of the amendment by item 15 is to recast and tighten the defence to the established offence at current subsection 245AB(3) for contravention of subsection 245AB(1), which also operates as an exception to the related civil penalty provision at subsection 245AB(5). The amendment establishes a clear connection between current section 245AB, as an established offence and civil penalty under Subdivision C, and the new civil penalty provisions at new sections 245AEC and 245AED. It reinforces the central role of the prescribed computer system as the means by which a person is required to satisfy themselves of a non-citizen's immigration status and work-related conditions when allowing that non-citizen to work or referring that non-citizen for work.

230. The defence is designed to be sufficiently broad to cover the practices of individuals and businesses that make genuine attempts to verify that a non-citizen is not an unlawful non-citizen, while ensuring the defence is centred on use of the prescribed computer system. Regardless of whether the information is obtained directly from the system by the first person, or by another person under an arrangement to source the information, the onus is on the first person to be satisfied, on the basis of that information, that the worker is not an unlawful non-citizen.

Item 16 Subsection 245AC(2)

231. This item repeals current subsection 245AC(2) and substitutes a new subsection 245AC(2).

232. Current section 245AC deals with allowing a non-citizen to work in breach of a visa condition. Current subsection 245AC(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 a lawful non-citizen; and
- the worker holds a visa that is subject to a work-related condition; and
- the worker is in breach of the work-related condition solely because of doing the work referred to in paragraph 245AC(1)(a).

233. Current subsection 245AC(2) provides an exception to current subsection 245AC(1), so that where a person takes reasonable steps at reasonable times to verify that the worker is not in breach of the work-related condition solely because of doing the work referred to in paragraph 245AC(1)(a), the first person would not contravene current subsection 245AC(1). Accordingly, current subsection 245AC(2) provides a specific defence in relation to a contravention of subsection 245AC(1). It operates as a defence to the offence in current subsection 245AC(3), and as an exception to the related civil penalty provision in current subsection 245AC(5).

234. New subsection 245AC(2), which replaces current subsection 245AC(2), recasts the defence to focus on obtaining information from the prescribed computer system, and for the first person to be reasonably satisfied, on the basis of that information, that the worker is not in breach of a work-related condition solely by reason of doing the work referred to in current paragraph 245AC(1)(a).

235. New subsection 245AC(2) provides that current subsection 245AC(1) does not apply if the first person is, and continues to be, reasonably satisfied that the worker is not in breach of the work-related condition solely because of doing the work allowed by the first person, on the basis of information obtained:

- by logging into and using the prescribed computer system to source the information; or
- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (unless the first person is a required system user under new section 245APB); or
- by doing any one or more things prescribed by the regulations.

236. The purpose of new paragraph 245AC(2)(a) is to provide that the defence (or exception) is available if the first person logs into and uses the prescribed computer system to obtain information to satisfy themselves that the worker would not be in breach of the

work-related condition of their visa solely because of doing the work allowed by the first person (per current paragraph 245AC(1)(a)). New section 245APE relevantly defines ***logging into*** for the purposes of Subdivision C. As defined by section 245APE, a person logs into the prescribed computer system by accessing the system under an account maintained by or for the person.

237. The purpose of new paragraph 245AC(2)(b) is to provide that the defence (or the exception, in relation to the civil penalty in current subsection 245AC(5)) is, alternatively, available to the first person where the information is obtained under an arrangement by which another person logs into and uses the prescribed computer system to source the information.

New paragraph 245AC(2)(b) – illustrative examples

Checks may be "contracted out"

Employer A1 has in excess of 200 active employees at any time, including a large seasonal workforce of non-citizens on student visas, working holiday visas and various other temporary and permanent visas.

Given the volume and turnover of non-citizen workers, Employer A1 engages the services of another business – Service B1 – to conduct checks of prospective non-citizen workers' details in VEVO (the prescribed computer system).

When hiring a new non-citizen worker, Employer A1 obtains the non-citizen's agreement for the necessary information (name, date of birth, passport details etc) to be provided to Service B1 to conduct a check in VEVO. Service B1 logs into VEVO and conducts the check, and provides the results of that check to Employer A1.

On the basis of this information, Employer A1 may be reasonably satisfied that the new non-citizen worker would not be in breach of the work-related condition of their visa because of working for Employer A1.

The worker can provide the information

Employer A2 is a small business with fewer than 20 employees. Employer A2 has not registered as an organisation to use VEVO to check non-citizen workers' immigration status and work–related visa conditions.

Employer A2 advertises a new part-time vacancy (to work up to 15 hours per week) and identifies a suitable candidate. The candidate indicates they are a non-citizen, and that they hold a student visa.

As Employer A2 has not registered to use VEVO, Employer A2 is unable to log into VEVO to obtain information to be satisfied of the non-citizen's immigration status and work-related conditions. Instead, the candidate offers to log into VEVO directly and initiate a system-generated email, to be sent directly from VEVO to Employer A2's email address.

Employer A2 agrees, and provides an email address to the candidate for this purpose. The candidate logs into VEVO as a visa holder, and generates an auto-generated email to Employer A2's address.

Shortly after this, Employer A2 receives the email from VEVO. It includes information including the candidate's name, date of birth and other details. The email includes information about the candidate's immigration status and work-related conditions, and confirms that the candidate holds a student visa.

On the basis of this information, Employer A2 may be reasonably satisfied that the candidate, working up to 15 hours per week for Employer A2, would not be in breach of the work-related condition of their student visa because of that work.

238. Importantly, new paragraph 245AC(2)(b) also provides that the defence is not available under this paragraph if the first person is a ***required system user*** within the meaning given by new section 245APB. If a person is a ***required system user***, the person may not obtain the information by arranging for another person to log into and use the system (as otherwise contemplated by new paragraph 245AC(2)(b)). If a person is a ***required system user***, the new subsection 245AC(2) defence may still be available where the person obtains information by the means specified in either paragraph 245AC(2)(a), or paragraph 245AC(2)(c).

239. New paragraph 245AC(2)(c) establishes a regulation-making power for the Migration Regulations to prescribe other things that the first person could do in order to obtain information to be reasonably satisfied that the worker would not be in breach of the work-related condition of their visa solely because of doing the work allowed by the first person (per current paragraph 245AC(1)(a)). This provision provides the flexibility to prescribe other things that may be done to obtain information on the basis of which the first person may be satisfied that a worker would not be in breach of the work-related condition of their visa solely because of doing the work allowed by the first person (per current paragraph 245AC(1)(a)). This provision complements new section 245APA, which deals with circumstances in which information is unobtainable by accessing the prescribed computer system.

240. The defence in new subsection 245AC(2) is available where the first person is, and continues to be, reasonably satisfied that the worker is not an unlawful non-citizen, on the basis of information obtained by any of the means set out at paragraphs 245AC(2)(a), (b) or (c). This is intended to clarify that the defence is not available if information so obtained reasonably indicates that the worker concerned may be in breach of a work-related condition. The requirement that the first person is, and continues to be, reasonably satisfied, is intended to make clear that the intention is that, in the context of an ongoing arrangement with a non-citizen to allow that non-citizen to work, the first person would be expected to check at reasonable intervals or after receiving information that might raise a potential issue or change in the worker's immigration status.

241. The purpose of the amendment by item 16 is to recast and tighten the defence to the established offence at current subsection 245AC(3) for contravention of subsection 245AC(1), which also operates as an exception to the related civil penalty provision at subsection 245AC(5). The amendment establishes a clear connection between current section 245AC, as an established offence and civil penalty under Subdivision C, and the new civil penalty provisions at new sections 245AEC and 245AED. It reinforces the central role of the prescribed computer system as the means by which a person is required to satisfy themselves of a non-citizen's immigration status and work-related conditions when allowing that non-citizen to work or referring that non-citizen for work.

242. The defence is designed to be sufficiently broad to cover the practices of individuals and businesses that make genuine attempts to verify that a non-citizen is not working in breach of a work-related condition of their visa, while ensuring the defence is centred on use of the prescribed computer system. Regardless of whether the information is obtained directly from the system by the first person, or by another person under an arrangement to source the information, the onus is on the first person to be reasonably satisfied, on the basis of that information, that the worker would not be in breach of the work-related condition of their visa solely because of doing the work allowed by the first person (per current paragraph 245AC(1)(a)).

Item 17 Subsection 245AE(2)

243. This item repeals current subsection 245AE(2) and substitutes a new subsection 245AE(2).

244. Current section 245AE deals with referring an unlawful non-citizen for work. Current subsection 245AE(1) provides that a person (the ***first person***) contravenes this subsection if:

- the first person operates a service, whether for reward or otherwise, referring other persons to a third person for work; and
- the first person refers another person (the ***prospective worker***) to a third person for work; and
- at the time of the referral, the prospective worker is an unlawful non-citizen.

245. Current subsection 245AE(2) provides an exception to subsection 245AE(1) so that where a person takes reasonable steps at reasonable times to verify that a prospective worker is not an unlawful non-citizen, the first person would not contravene current subsection 245AE(1). Accordingly, current subsection 245AE(2) provides a specific defence in relation to a contravention of subsection 245AE(1). It operates as a defence to the offence in current subsection 245AE(3), and as an exception to the related civil penalty provision in current subsection 245AE(5).

246. New subsection 245AE(2), which replaces current subsection 245AE(2), recasts the defence to focus on obtaining information from the prescribed computer system, and for the first person to be reasonably satisfied at the time of referral, on the basis of that information, that the prospective worker is not an unlawful non-citizen.

247. New subsection 245AE(2) provides that current subsection 245AE(1) does not apply if the first person is, and continues to be, reasonably satisfied that the prospective worker is not an unlawful non-citizen, on the basis of information obtained:

- by logging into and using the prescribed computer system to source the information; or
- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (unless the first person is a required system user under new section 245APB); or

- by doing any one or more things prescribed by the regulations.

248. The purpose of new paragraph 245AE(2)(a) is to provide that the defence (or the exception, in relation to the civil penalty in current subsection 245AE(5)) is available if the first person logs into and uses the prescribed computer system to obtain information to satisfy themselves that the prospective worker is not an unlawful non-citizen. New section 245APE relevantly defines the expression ***logging into*** for the purposes of Subdivision C. As defined by section 245APE, a person logs into the prescribed computer system by accessing the system under an account maintained by or for the person.

249. The purpose of new paragraph 245AE(2)(b) is to provide that the defence (or exception) is, alternatively, available to the first person where the information is obtained under an arrangement by which another person logs into and uses the prescribed computer system to source the information.

New paragraph 245AE(2)(b) – illustrative examples

Checks may be "contracted out"

Labour hire company B1 supplies workers on a short-term basis to businesses in the agriculture sector to harvest fruit and vegetables. B1 has in excess of 500 registered workers available to be referred for harvest work as needed. These workers are primarily non-citizens.

As part of its operating model, B1 advertises for and recruits workers, but outsources checks of non-citizen workers' immigration status and work-related visa conditions under a contractual arrangement with Service C1. Service C1 provides a range of reference-checking and other verification services, including VEVO checks in relation to prospective non-citizen workers.

To ensure that any non-citizen workers that it is referring for work are not unlawful non-citizens, B1 has established a process with Service C1 whereby B1 provides a list to Service C1 with details of prospective workers before referring them to a farm or orchard for work. This process is repeated each time a non-citizen is referred for work.

Service C1 logs into VEVO and uses the information provided in relation to prospective workers on the list from B1 to check the workers' immigration status and work-related visa conditions.

Service C1 provides the results of these checks to B1. On the basis of this information, B1 is able to consider and may be reasonably satisfied as to whether the prospective workers are not unlawful non-citizens before referring them for work.

The prospective worker can provide the information

Labour hire company B2 has not registered as an organisation to use VEVO to check prospective non-citizen workers' immigration status and work–related visa conditions.

As part of B2's operating model, when a non-citizen registers interest with B2 in being referred for short-term or seasonal work, B2 requires the non-citizen to provide B2 with information about their current immigration status and work-related visa conditions (if any).

B2 requires the non-citizen to do this by logging into VEVO and initiating a system-generated email to a dedicated email address maintained by B2 to receive information from VEVO in relation to prospective workers.

When B2 identifies suitable work for a non-citizen who has registered with B2, B2 requires the non-citizen to initiate another VEVO check and system-generated email to the same email address maintained by B2, to check whether the non-citizen's immigration status has changed in the intervening period.

On the basis of this information, B2 may be reasonably satisfied that the prospective worker is not an unlawful non-citizen at the time of referral.

250. Importantly, new paragraph 245AE(2)(b) also provides that the defence is not available under this paragraph if the first person is a ***required system user*** within the meaning given by new section 245APB. If a person is a ***required system user***, the person may not obtain the information by arranging for another person to log into and use the system (as otherwise contemplated by new paragraph 245AE(2)(b)). If a person is a ***required system user***, the new subsection 245AE(2) defence may still be available where the person obtains information by the means specified in either paragraph 245AE(2)(a), or paragraph 245AE(2)(c).

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

252. The purpose of the amendment by item 17 is to recast and tighten the defence to the established offence at current subsection 245AE(3) for contravention of subsection 245AE(1), which also operates as an exception to the related civil penalty provision at subsection 245AE(5). The amendment establishes a clear connection between current section 245AE, as an established offence and civil penalty under Subdivision C, and the new civil penalty provisions at new sections 245AEC and 245AED. It reinforces the central role of the prescribed computer system as the means by which a person is required to satisfy themselves of a non-citizen's immigration status and work-related conditions when allowing that non-citizen to work or referring that non-citizen for work.

253. The defence is designed to be sufficiently broad to cover the practices of individuals and businesses that make genuine attempts to verify that a non-citizen is not an unlawful non-citizen, while ensuring the defence is centred on use of the prescribed computer system. Regardless of whether the information is obtained directly from the system by the first person, or by another person under an arrangement to source the information, the onus is on the first person to be reasonably satisfied, on the basis of that information, that the prospective worker is not an unlawful non-citizen.

Item 18 Subsection 245AEA(2)

254. This item repeals current subsection 245AEA(2) and substitutes a new subsection 245AEA(2).

255. Current section 245AEA deals with referring a lawful non-citizen for work in breach of a work-related condition. Current subsection 245AEA(1) provides that a person (the ***first person***) contravenes subsection 245AEA(1) if:

- the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
- the first person refers another person (the ***prospective worker***) to a third person for work; and
- at the time of the referral:
  - the prospective worker is a lawful non-citizen; and
  - the prospective worker holds a visa that is subject to a work-related condition; and
  - the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which they are referred.

256. Current subsection 245AEA(2) provides an exception to subsection 245AEA(1) so that where a person takes reasonable steps at reasonable times before the referral to verify that the prospective worker will not be in breach of the work-related condition solely because of doing the work in relation to which they are referred, the first person would not contravene current subsection 245AEA(1). Accordingly, current subsection 245AEA(2) provides a specific defence in relation to a contravention of subsection 245AEA(1). It operates as a defence to the offence in current subsection 245AEA(3), and as an exception to the related civil penalty provision in current subsection 245AEA(5).

257. New subsection 245AEA(2), which replaces current subsection 245AEA(2), recasts the defence to focus on obtaining information from the prescribed computer system, and for the first person to be reasonably satisfied, at the time of referral, that the prospective worker would not be in breach of the work-related condition solely because of doing the work mentioned in current paragraph 245AEA(1)(b).

258. New subsection 245AEA(2) provides that current subsection 245AEA(1) does not apply if the first person, at the time of referral, is reasonably satisfied that the prospective worker would not be in breach of the work-related condition solely because of doing the work for which they are referred, on the basis of information obtained:

- by logging into and using the prescribed computer system to source the information; or
- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (unless the first person is a required system user under new section 245APB); or

- by doing any one or more things prescribed by the regulations.

259. The purpose of new paragraph 245AEA(2)(a) is to provide that the defence (or exception) is available if the first person logs into and uses the prescribed computer system to obtain information to satisfy themselves that the prospective worker would not be in breach of the work-related condition of their visa solely because of doing the work allowed by the first person (per current paragraph 245AEA(1)(b)). New section 245APE relevantly defines ***logging into*** for the purposes of Subdivision C. As defined by section 245APE, a person logs into the prescribed computer system by accessing the system under an account maintained by or for the person.

260. The purpose of new paragraph 245AEA(2)(b) is to provide that the defence (or exception) is, alternatively, available to the first person where the information is obtained under an arrangement by which another person logs into and uses the prescribed computer system to source the information.

New paragraph 245AEA(2)(b) – illustrative examples

Checks may be "contracted out"

Labour hire company B1 supplies workers on a short-term basis to businesses in the agriculture sector to harvest fruit and vegetables. B1 has in excess of 500 registered workers available to be referred for harvest work as needed. These workers are primarily non-citizens.

As part of its operating model, B1 advertises for and recruits workers, but outsources checks of non-citizen workers' immigration status and work-related visa conditions under a contractual arrangement with Service C1. Service C1 provides a range of reference-checking and other verification services, including VEVO checks in relation to prospective non-citizen workers.

To ensure that any non-citizen workers that it refers for work would not be in breach of the work-related conditions of their visas, B1 has established a process with Service C1 whereby B1 provides a list to Service C1 with details of prospective workers before referring them to a farm or orchard for work. This process is repeated each time a non-citizen is referred for work.

Service C1 logs into VEVO and uses the information provided in relation to prospective workers on the list from B1 to check the workers' immigration status and work-related visa conditions.

Service C1 provides the results of these checks to B1. On the basis of this information, B1 is able to consider and may be reasonably satisfied, at the time of referring them for work, whether the prospective workers would be working in breach of a work-related condition of their visas as a result of doing that work.

The prospective worker can provide the information

Labour hire company B2 has not registered as an organisation to use VEVO to check prospective non-citizen workers' immigration status and work–related visa conditions.

As part of B2's operating model, when a non-citizen registers interest with B2 in being referred for short-term or seasonal work, B2 requires the non-citizen to provide B2 with information about their current immigration status and work-related visa conditions (if any).

B2 requires the non-citizen to do this by logging into VEVO and initiating a system-generated email to a dedicated email address maintained by B2 to receive information from VEVO in relation to prospective workers.

When B2 identifies suitable work for a non-citizen who has registered with B2, B2 requires the non-citizen to initiate another VEVO check and system-generated email to the same email address maintained by B2, to reconfirm the non-citizen's immigration status and current work-related visa conditions.

On the basis of this information, B2 may be reasonably satisfied that, at the time of referral, the prospective worker would not be working in breach of a work-related condition of their visa on the basis of the work for which B2 is referring them.

261. Importantly, new paragraph 245AEA(2)(b) also provides that the defence is not available under this paragraph if the first person is a ***required system user*** within the meaning given by new section 245APB. If a person is a ***required system user***, the person may not obtain the information by arranging for another person to log into and use the system (as otherwise contemplated by new paragraph 245AEA(2)(b)). If a person is a ***required system user***, the new subsection 245AEA(2) defence may still be available where the person obtains information by the means specified in either paragraph 245AEA(2)(a), or paragraph 245AEA(2)(c).

262. New paragraph 245AEA(2)(c) establishes a regulation-making power for the Migration Regulations to prescribe other things that the first person could do in order to obtain information to be reasonably satisfied, at the time of referral, that the prospective worker would not be in breach of the work-related condition of their visa solely because of doing the work for which they are referred (per current paragraph 245AEA(1)(b)). This provision provides the flexibility to prescribe other things that may be done to obtain information on the basis of which the first person may be satisfied that a prospective worker would not be in breach of the work-related condition of their visa solely because of doing the work for which they are referred. This provision complements new section 245APA, which deals with circumstances in which information is unobtainable by accessing the prescribed computer system.

263. The purpose of the amendment by item 18 is to recast and tighten the defence to the established offence at current subsection 245AEA(3) for contravention of subsection 245AEA(1), which also operates as an exception to the related civil penalty provision at subsection 245AEA(5). The amendment establishes a clear connection between current section 245AEA, as an established offence and civil penalty under Subdivision C, and the new civil penalty provisions at new sections 245AEC and 245AED. It reinforces the central role of the prescribed computer system as the means by which a person is required to satisfy themselves of a non-citizen's immigration status and work-related conditions when allowing that non-citizen to work or referring that non-citizen for work.

264. The defence is designed to be sufficiently broad to cover the practices of individuals and businesses that make genuine attempts to verify that a non-citizen is not working in

breach of a work-related condition of their visa, while ensuring the defence is centred on use of the prescribed computer system. Regardless of whether the information is obtained directly from the system by the first person, or by another person under an arrangement to source the information, the onus is on the first person to be reasonably satisfied at the time of referral, on the basis of that information, that the prospective worker would not be in breach of the work-related condition of their visa solely because of doing the work for which they are referred (per current paragraph 245AEA(1)(b)).

Item 19 After section 245AEB

265. This item inserts new sections 245AEC and 245AED after current section 245AEB.

New section 245AEC – Verifying permission to work—allowing non-citizens to begin work

266. New section 245AEC establishes a new statutory requirement that a person must not allow a non-citizen to begin work unless the person has determined whether that non-citizen would have the required permission to do that work.

267. The term ***required permission*** is defined in section 245APE to mean that a non-citizen has, or would have, the required permission to do particular work if:

- the person is a lawful non-citizen; and
- the person is not, or would not be, in breach of any work-related condition to which the visa held by the person is subject solely because of doing that work.

268. New paragraphs 245AEC(a) and (b) set out the means by which information may be obtained for the purposes of determining this. This includes:

- by logging into and using the prescribed computer system to source the information (new paragraph 245AEC(a)); or
- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (new paragraph 245AEC(b)).

269. Importantly, if a person is a ***required system user*** (within the meaning given by new section 245APB), that person is not able to obtain the relevant information under an arrangement of a kind described in new paragraph 245AEC(b). Where a person is a ***required system user***, the information must be obtained by the person logging into and using the prescribed computer system to source the information. This requirement is subject to the application of new section 245APA, which provides that information may be obtained by other means (prescribed by regulations) if, on a particular occasion, information cannot be sourced by logging into and using the prescribed computer system, due to circumstances beyond the reasonable control of the person.

270. New section 245AEC is a civil penalty provision. A person who contravenes this provision would be liable to a maximum civil penalty of 48 penalty units.

271. A note at the foot of Examples 1 and 2, which appear immediately below new section 245AEC, draws the reader's attention to the application of current section 486ZF of the

Migration Act to section 245AEC. Current section 486ZF provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order.

272. New section 245AEC establishes a positive obligation on a person (the ***first person***) to obtain information about a non-citizen's immigration status and any work-related conditions from the prescribed computer system, before allowing that non-citizen to begin work. If the information obtained under paragraph 245AEC(a) or (b) reasonably indicates the non-citizen does not have the required permission, and the first person nonetheless allows the non-citizen to work, this would not amount to a contravention of section 245AEC. In this case, the first person has complied with the requirements of section 245AEC, but by allowing the non-citizen to work without the required permission, would contravene either section 245AB (allowing an unlawful non-citizen to work) or section 245AC (allowing a non-citizen to work in breach of a work-related condition of their visa). In this way, new section 245AEC is intended to complement the established offences and civil penalty provisions in current sections 245AB and 245AC.

273. The purpose of new section 245AEC is to reinforce the importance of using the prescribed computer system to determine whether a non-citizen worker would have the required permission to do that work – before allowing the non-citizen to begin that work.

274. This provision is intended to complement the defences at subsections 245AB(2), 245AC(2), 245AE(2) and 245AEA(2), while also establishing an express legislative requirement to use the prescribed computer system to obtain information before allowing a non-citizen to begin work. Use of a prescribed computer system has been available as a statutory defence to the offences in sections 245AB, 245AC, 245AE and 245AEA since these provisions were inserted in the Migration Act by amendments by the *Migration Amendment (Employer Sanctions) Act 2007*, which commenced on 19 August 2007.

275. VEVO is central to the Department's efforts to support employers, labour hire intermediaries and others to determine whether a non-citizen is allowed to work. Introducing new express statutory requirements to use the prescribed computer system (VEVO) when allowing a non-citizen to begin work, or when referring a non-citizen for work, is intended to ensure that employers, labour hire intermediaries are taking the necessary steps, not only to protect migrant workers, but also themselves against the risk of committing an offence against current sections 245AB, 245AC, 245AE and 245AEA.

Evidence in court proceedings – obtaining information from the prescribed computer system

276. Current section 271 sets out the things that are taken to be *prima facie* evidence of certain matters for the purposes of migration proceedings. The term ***migration proceedings*** is defined in current subsection 271(4) to mean:

- proceedings in a court (including criminal proceedings) under the Migration Act or in relation to an offence a contravention of a civil penalty provision under the Migration Act, or in relation to a deportation order; or

- proceedings in the AAT for the review of a decision under the Migration Act, including a decision to make a deportation order; or

- proceedings in the Immigration Assessment Authority for the review of a fast-track reviewable decision.

277. Relevantly, current paragraph 271(1)(m) provides that a certificate signed by an ***officer*** (as defined in subsection 5(1) of the Migration Act) stating:

- whether or not a specified person used a specified computer system at a specified time, or during a specified period, to obtain information about another specified person; and

- if the specified computer system was so used - the information about the other specified person that was provided by the system to the user at that time or during that period;

is prima facie evidence of the matters stated in the certificate.

278. The purpose of this provision is to clarify that the use of a ***prescribed computer system*** to verify whether a person holds a visa or holds a visa subject to a work-related condition, and the information the system provided to the user about that person, is *prima facie* evidence of the matters in the certificate.

279. The effect of this provision is that the Department, the ABF or another party is able to rely on checks of the VEVO system, as the ***prescribed computer system***, to submit to the court, in proceedings, that a person did or did not verify the permission of a worker or a prospective worker to work in Australia, and for this evidence to be taken as prima facie evidence of the fact. Another party is able to rely on this evidence in the same way, obviating the need to keep separate records of work entitlements checks undertaken via the prescribed computer system. This evidence can be rebutted in court.

New section 245AED – Verifying permission to work—referring non-citizens for work

280. New section 245AED establishes a new statutory requirement that a person must not refer a non-citizen for work unless the first person has determined whether the non-citizen, as a prospective worker, would have the required permission to do that work.

281. New subsection 245AED(1) provides that section 245AED applies to a person (the ***first person***) who operates a service, whether for reward or otherwise, referring other persons to third persons for work. This provision is intended to apply to labour hire intermediaries, recruitment agencies, subcontractors and other persons operating a service that refers a person to another person for work, where it is appropriate that the onus is on the first person to determine whether a non-citizen would have the required permission to work, before referring them to another person for work.

282. New subsection 245AED(2) provides that the first person must not refer a non-citizen for work unless the first person has determined whether the non-citizen would have the required permission to do that work. The term ***required permission*** is defined in section 245APE to mean that a non-citizen has, or would have, the required permission to do particular work if:

- the person is a lawful non-citizen; and

- the person is not, or would not be, in breach of any work-related condition to which the visa held by the person is subject solely because of doing that work.

283. New paragraphs 245AED(2)(a) and (b) set out the means by which information may be obtained for the purposes of determining this. This includes:

- by logging into and using the prescribed computer system to source the information (new paragraph 245AED(2)(a)); or

- under an arrangement by which another person logs into and uses the prescribed computer system to source the information (new paragraph 245AED(2)(b)).

284. Importantly, if a person is a ***required system user*** (within the meaning given by new section 245APB), that person is not able to obtain the relevant information under an arrangement of a kind described in new paragraph 245AED(2)(b). Where a person is a required system user, the information must be obtained by the person logging into and using the prescribed computer system to source the information. This requirement is subject to the application of new section 245APA, which provides that information may be obtained by other means (prescribed by regulations) if, on a particular occasion, information cannot be sourced by logging into and using the prescribed computer system, due to circumstances beyond the reasonable control of the person.

285. New section 245AED is a civil penalty provision. A person who contravenes this provision would be liable for a maximum civil penalty of 48 penalty units.

286. A note at the foot of Examples 1 and 2, which appear immediately below new section 245AED, draws the reader's attention to the application of current section 486ZF of the Migration Act to section 245AED. Current section 486ZF provides that it is not necessary to prove a person's state of mind in proceedings for a civil penalty order.

287. New section 245AED establishes a positive obligation on a person (the ***first person***) to obtain information about a non-citizen's immigration status and any work-related conditions from the prescribed computer system, before referring that non-citizen for work. If the information obtained under paragraph 245AED(2)(a) or (b) reasonably indicates the non-citizen does not have the required permission, and the first person nonetheless refers the non-citizen for work, this would not amount to a contravention of section 245AED. In this case, the first person has complied with the requirements of section 245AED, but by referring the non-citizen for work without the required permission, would contravene either section 245AE (referring an unlawful non-citizen for work) or section 245AEA (referring a non-citizen for work in breach of a work-related condition of their visa). In this way, new section 245AED is intended to complement the established offences and civil penalty provisions in current sections 245AE and 245AEA.

288. The purpose of new section 245AED is to reinforce the importance of using the prescribed computer system to determine whether a non-citizen worker would have the required permission to do that work - before allowing the non-citizen to begin that work.

289. This provision is intended to complement the defences at subsections 245AB(2), 245AC(2), 245AE(2) and 245AEA(2), while also establishing an express legislative requirement to use the prescribed computer system to obtain information before allowing a

non-citizen to begin work. Use of a prescribed computer system has been available as a statutory defence to the offences in sections 245AB, 245AC, 245AE and 245AEA since these provisions were inserted in the Migration Act by amendments by the *Migration Amendment (Employer Sanctions) Act 2007*, which commenced on 19 August 2007.

290. VEVO is central to the Department's efforts to support employers, labour hire intermediaries and others to determine whether a non-citizen is allowed to work. Introducing new express statutory requirements to use the prescribed computer system (VEVO) when allowing a non-citizen to begin work, or when referring a non-citizen for work, is intended to ensure that employers, labour hire intermediaries are taking the necessary steps, not only to protect migrant workers, but also themselves against the risk of committing an offence against current sections 245AB, 245AC, 245AE and 245AEA.

Item 20 At the end of Subdivision C of Division 12 of Part 2

291. This item inserts new sections 245APA, 245APB, 245APC, 245APD and 245APE at the end of current Subdivision C of Division 12 of Part 2 of the Migration Act.

New section 245APA – Prescribed computer system—information unobtainable by accessing the system

292. New section 245APA provides for alternative means by which a person may obtain information from the prescribed computer system, where that information cannot be sourced from the system due to circumstances beyond that person's reasonable control.

293. New subsection 245APA(2) provides that where the circumstances in subsection 245APA(1) apply, information may be obtained by doing one or more things prescribed by regulations made for the purposes of subsection 245APA(2).

294. The purpose of new section 245APA is to ensure that in the event information is unobtainable by accessing the prescribed computer system, there are alternative means of obtaining the necessary information are available in the legislation.

295. This section contemplates that the prescribed system may be unavailable from time to time, due to planned or unplanned outages. In the event this occurs at a time where a person requires access to the system for the purposes of new section 245AEC or 245AED, or for another purpose under Subdivision C, the Migration Regulations will prescribe alternative means by which to obtain the relevant information on that occasion.

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

New section 245APB – Prescribed computer system—meaning of required system user

297. New section 245APB establishes the meaning of ***required system user*** for the purposes of Subdivision C as amended by the items in this Part.

298. It provides that a person is a required system user at any time if:

- the person has been a prohibited employer within the previous 12 months; or
- the person is included in a class that is determined by an instrument under new section 245APC; or
- the person is declared under new section 245APD to be a required system user.

299. Subsection 5(1) of the Migration Act, as amended by item 7 in Part 2 of the Schedule to the Bill, refers the reader to new section 245AYC for the meaning of the term ***prohibited employer***.

New section 245APC – Prescribed computer system—determination of required system users by class

300. New subsection 245APC(1) establishes a new power for the Minister to determine a class of persons for the purposes of paragraph 245APB(b) of the definition of ***required system user***. A determination under new subsection 245APC(1) is made by legislative instrument.

301. New subsection 245APC(2) establishes a precondition to the exercise of the power in new subsection 245APC(1). For the Minister to determine a class of persons for the purposes of new paragraph 245APB(b), the Minister must first be satisfied that making the determination is reasonably necessary to enhance the exclusive use of the prescribed computer system to confirm that non-citizens allowed to work, or referred for work, by those persons have the required permission to do that work.

302. New subsection 245APC(3) provides that section 42 of the Legislation Act applies to an instrument made under new subsection 245APC(1). Section 42 of the Legislation Act provides for the disallowance of legislative instruments, subject to section 44 of that Act. The purpose of new subsection 245APC(3) is to provide that a legislative instrument made under subsection 245APC(1) is disallowable, despite regulations made for the purposes of paragraph 44(2)(b) of the Legislation Act.

303. The intention of new section 245APC is to provide a means by which the Minister may determine a class of persons who would be precluded from relying on an arrangement by which another person logs into and uses the prescribed computer system to source the information on their behalf. The effect of this is that a person in such a class is required to log into and use the prescribed computer system to source the information directly, for the purposes of new sections 245AEC and 245AED, as well as the amended defences in subsections 245AB(2), 245AC(2), 245AE(2) and 245AEA(2).

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

305. This provision is also distinct from new section 245APD, under which the Minister may declare a particular person to be a required system user for the purposes of new paragraph 245APB(c). A declaration made under new section 245APD is an administrative decision.

New section 245APD – Prescribed computer system—declaration of specific required system users

306. New subsection 245APD(1) provides that the Minister may declare a person to be a required system user for the purposes of new paragraph 245APB(c). This must be done by written notice to the person.

307. New subsection 245APD(2) establishes a criterion to be satisfied before making a declaration under new subsection 245APD(1) to declare a person to be a required system user. If a particular person has a history of non-compliance with the requirements of Subdivision C, it may be considered reasonably necessary to require that person to log into and use the prescribed computer system directly, instead of relying on other arrangements to obtain information from the system.

308. New subsection 245APD(3) provides that a declaration given to a person under subsection 245APD(1) has effect from a day specified in the declaration, but that this day can be no sooner than 10 days after the day the declaration is given. The declaration must also specify a period after that day, of no longer than 12 months, for which the declaration remains in effect. Under paragraph 245APD(3)(c), a declaration given under subsection 245APD(1) may be renewed, or further renewed, for a period on each occasion of no longer than 12 months (unless sooner revoked). Written notice of the renewal must be given to the person.

309. New subsection 245APD(4) provides that if the Minister renews (or further renews) a declaration by notice to a person under paragraph 245APD(3)(c), the notice of renewal must be given to the person no sooner than 10 days before the declaration would otherwise stop having effect. Under paragraph 245APD(4)(b), in order to renew the declaration, the Minister must also be satisfied that subsection 245APD(2) continues to apply in relation to the person.

310. New subsection 245APD(5) provides that applications may be made to the AAT for review of either:

- a decision under subsection 245APD(1) to declare a person to be a required system user; or

- a decision under paragraph 245APD(3)(c) to renew or to further renew a declaration of a person as a required system user.

311. A note immediately below this subsection draws the reader's attention to section 27A of the AAT Act, which requires that people whose interests are affected by the Minister's decision be given notice of their rights to seek review of the decision.

New section 245APE – Work by non-citizens—further definitions

312. New section 245APE provides definitions for the new expression ***logging into***, and the terms ***prescribed computer system*** and ***required permission***, for the purposes Subdivision C, as amended by the items in this Part.

The meaning of 'logging into'

313. The expression ***logging into*** is defined, in the context of the ***prescribed computer system***, to mean that a person accesses the system under an account maintained by or for that person.

314. For the purposes of new sections 245AEC and 245AED, and Subdivision C more broadly, this term contemplates that the prescribed computer system will require a person to register as a user of that system, and establish an account with unique credentials for the purposes of accessing and obtaining information from the system. This may be by way of a user logon and password, or other secure means.

315. The definition provides that the account may be maintained either by or for the person. In the context of Subdivision C, this definition contemplates that while some users of the prescribed system are individuals, others are not. For example, in some small businesses, the owner of the business may maintain an individual account in the prescribed system and conduct checks of that system directly before engaging a new non-citizen employee. Where the person is a larger corporation, or a business that offers a service that engages or refers large numbers of non-citizens to another person for work on a labour hire basis, this person may have arrangements in place whereby the required checks in the prescribed computer system are undertaken by an employee of the person, for example, in the human resources department – that is, where the account is maintained for the person, as provided for in the definition.

316. This definition is intended to provide appropriate flexibility in the legislation, in relation to the arrangements that an employer or another party subject to Subdivision C – without subverting the requirement to use the prescribed computer system.

The meaning of 'prescribed computer system'

317. The term ***prescribed computer system*** is defined to mean the computer system prescribed by the regulations for the purposes of this definition. It is intended that the computer system that will be prescribed by the regulations is the Visa Entitlement Verification Online (VEVO) system, which is a computer system that a person can use to verify, among other things, whether a non-citizen holds a visa that is in effect, or whether a non-citizen holds a visa with a condition or conditions which prohibit or restrict them from working in Australia.

The meaning of 'required permission'

318. The term ***required permission*** provides that a person has, or would have, the required permission to do particular work if:

- the person is a lawful non-citizen; and

- the person is not, or would not be, in breach of any work-related condition to which the visa held by the person is subject solely because of doing that work.

319. This definition is particularly relevant to new sections 245AEC and 245AED, which relate to verifying permission to work before allowing non-citizens to begin work, or referring non-citizens for work. A person who is subject to either of these sections is required to determine whether a non-citizen worker would have the required permission to work.

Division 2 Application

Item 21 Application of amendments

320. This item provides that the amendments of the Migration Act by this Part apply in relation to a person who is allowed to begin work, or a person referred for work, on or after the commencement of this Schedule.

321. This provision ensures that the new civil penalty provisions introduced at sections 245AEC and 245AED are wholly prospective in their application. Importantly, this does not affect the established requirements under current Subdivision C on a person who allows a non-citizen to work, or refers a non-citizen for work, to ensure that the non-citizen is not an unlawful non-citizen, and would not be in breach of work-related conditions of their visa as a result of the work.

Part 4 Aligning and increasing penalties for work-related breaches

Migration Act 1958

322. The amendments of the Migration Act by items in this Part of the Schedule to the Bill increase the 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 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.

323. The AGD Framing Guide has been considered in relation to the amendments by the items 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."

324. Increasing the available pecuniary penalties in the provisions amended by the items in this Part is intended to send a strong message to employers and other persons involved in the employment of migrant workers, that any contravention of the provisions of the Migration Act relating to migrant workers constitutes a serious breach.

325. The increases to the maximum pecuniary penalties for both criminal offences and civil penalty provisions by items in this Part are therefore more appropriate and proportionate than under the current penalty regime. The increased penalties better reflect the seriousness of illegal work practices and the exploitation of migrant workers, and are intended to allow for more appropriate deterrence and punishment of wilful and serious offending. The amendments increase the maximum 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, or which is an offence against the Act.

326. 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 migrant worker directly affected by that conduct, but also the significant damage that the actions of unscrupulous employers or labour hire intermediaries can have on visa program integrity and Australia's reputation as a destination of choice for prospective migrant workers. The amendments by items in this Part demonstrate that the Government considers all contraventions of provisions relating to the employment of non-citizens to be equally serious.

Increases to penalty units for civil penalties

327. Table 1.1 below sets out a comparison of the current maximum penalty units and the new maximum penalty units under the various work-related provisions in Subdivision C of Division 12 of Part 2 of the Migration Act, as amended by items in this Part. This table also sets out the current and new penalty units under subsections 140Q(1) and (2) of the Migration Act, as amended. Subsections 140Q(1) and (2) are civil penalty provisions in relation to failing to satisfy sponsorship obligations.

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	approved work sponsor – 240 other – 60*	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

**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.

328. For clarity, Table 1.1 does not include the amendment in relation to current subsection 245AK(2) by item 35 in this Part. This is a technical amendment, to ensure that new subsection 245AK(2) is consistent with current drafting practice. It does not result in a change in the penalty units specified under this civil penalty provision.

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

329. The amendments by items in this Part also increase the pecuniary penalties available for an offence against any of the work-related offences under the Migration Act. These increases are summarised in Table 1.2 below.

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 360 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 360 penalty units or both	aggravated offences if a person refers another person to a third person for work

Item 22 Subsections 140Q(1) and (2) (penalty)

330. This item repeals the civil penalty under each of subsections 140Q(1) and (2), and substitutes a new civil penalty. As amended, a person who contravenes either subsection 140Q(1) or (2) 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. The term ***approved work sponsor*** is relevantly defined under current subsection 5(1) of the Migration Act.

331. 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.

332. A person contravenes current subsection 140Q(1) if:

- the regulations (prescribed under current section 140H) impose a sponsorship obligation on the person; and
- the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations.

333. A person contravenes current subsection 140Q(2) if:

- the person (other than a Minister) is a party to a work agreement; and
- the terms of the work agreement:
  - vary a sponsorship obligation that would otherwise be imposed on the person by the regulations; or
  - impose an obligation, identified in the agreement as a sponsorship obligation, on the person; and
  - the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) specified in the work agreement.

334. 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.

335. 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 23 Subsection 245AB(3)

336. 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).

337. 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.

338. Current subsection 245AB(3) provides that a person commits an offence if the person contravenes current subsection 245AB(1). It further provides that the physical elements of that offence are set out in current subsection 245AB(1). The maximum penalty for an offence under current subsection 245AB(3) is 2 years imprisonment.

339. New subsection 245AB(3) is equivalent in effect to current subsection 245AB(3), aside from the penalty. The penalty under new subsection 245AB(3) provides that the new maximum penalty for an offence under new subsection 245AB(3) is 2 years imprisonment, or 360 penalty units, or both.

340. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty units in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

341. 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.

342. 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.

343. 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 section 4B 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.

344. The note to new subsection 245AB(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 245AB(2) (as amended by item 15 in Part 3 of the Schedule to the Bill).

Item 24 Subsection 245AB(5)

345. 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, as new subsection 245AB(5).

346. 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.

347. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

348. This penalty 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.

349. This penalty 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.

350. 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. 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.

351. 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.

352. 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. The application of established non-fault civil penalties in relation to contravention of work-related provisions reflects the Government's determination to address the problem of the misuse of the temporary migration program through illegal work hire practices and the exploitation of migrant workers.

Item 25 Subsection 245AC(3)

353. 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).

354. Current section 245AC of the Migration Act deals with allowing a lawful non-citizen to work in breach of a work-related condition. Current subsection 245AC(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 a lawful non-citizen; and
- the worker holds a visa that is subject to a work-related condition; and
- the worker is in breach of the work-related condition solely because of doing the work allowed by the first person.

355. Current subsection 245AC(3) provides that a person commits an offence if the person contravenes current subsection 245AC(1). It further provides that the physical elements of that offence are set out in current subsection 245AC(1). The maximum penalty for an offence under current subsection 245AC(3) is 2 years imprisonment.

356. 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.

357. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

358. This penalty must also be read with subsection 4B(2) of the Crimes Act. 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.

359. 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.

360. 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.

361. 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) (as amended by item 16 in Part 3 of the Schedule to the Bill).

Item 26 Subsection 245AC(5)

362. 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).

363. Current section 245AC of the Migration Act deals with allowing a lawful non-citizen to work in breach of a work-related condition. Current subsection 245AC(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 a lawful non-citizen; and
- the worker holds a visa that is subject to a work-related condition; and
- the worker is in breach of the work-related condition solely because of doing the work allowed by the first person.

364. Current subsection 245AC(5) provides that a person is liable to a civil penalty if the person contravenes current subsection 245AC(1). The maximum civil penalty for contravention of that provision is 90 penalty units.

365. 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.

366. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

367. This penalty 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.

368. This penalty must also be read with current 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.

369. 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. 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.

370. The effect of this note is to clarify that it is sufficient to establish that a person contravened subsection 245AC(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 paragraphs 245AC(1)(b), (c) and (d) in a criminal offence.

371. This means that a person is liable to a civil penalty under new subsection 245AC(5) without knowing or being reckless as to whether a worker is in breach of the work-related condition of their work solely because of doing the work allowed by the first person, if the first person allows or continues to allow that worker to work. The application of established non-fault civil penalties in relation to contravention of work-related provisions reflects the Government's determination to address the problem of the misuse of the temporary migration program through illegal work hire practices and the exploitation of migrant workers.

Item 27 Subsections 245AD(1) and (2) (penalty)

372. This item repeals the penalty under current subsections 245AD(1) and (2) and substitutes a new penalty.

373. Current section 245AD of the Migration Act creates aggravated offences if a person allows, or continues to allow, another person to work.

374. The current penalty for an offence against subsection 245AD(1) or (2) is five years imprisonment. The amendments by item 27 replace this penalty with a new penalty of five years imprisonment, or 360 penalty units, or both.

375. A note appears above the penalty. The note directs 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.

376. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

377. This penalty must also be read with subsection 4B(2) of the Crimes Act. 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.

378. 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.

379. The maximum pecuniary penalty of 360 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, 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 245AD as amended are viewed seriously, and that an offence against section 245AD warrants a significant penalty.

Item 28 Subsections 245AD(1) and (2) (note)

380. This item amends current subsections 245AD(1) and (2) by repealing the note at the foot of each subsection. This amendment is consequential to the amendment of the subsection 245AD(1) and (2) penalties by item 27, whereby the note in relation to section 245AH now appears at the foot of the subsection, above the penalty.

381. This amendment reflects the current drafting convention in relation to penalty provisions, which requires a note or example to a subsection or section that has a penalty at its foot to appear before the penalty rather than after it.

Item 29 Subsection 245AE(3)

382. 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).

383. Current section 245AE of the Migration Act deals with referring an unlawful non-citizen for work. Current subsection 245AE(1) provides that a person (the ***first person***) contravenes this subsection if:

- the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
- the first person refers another person (the prospective worker) to a third person for work; and
- at the time of the referral, the prospective worker is an unlawful non-citizen.

384. Current subsection 245AE(3) provides that a person commits an offence if the person contravenes current subsection 245AE(1). It further provides that the physical elements of that offence are set out in current subsection 245AE(1). The maximum penalty for an offence under current subsection 245AE(3) is 2 years imprisonment.

385. 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.

386. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

387. This penalty must also be read with subsection 4B(2) of the Crimes Act. 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.

388. 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.

389. 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.

390. 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) (as amended by item 16 in Part 3 of the Schedule to the Bill).

Item 30 Subsection 245AE(5)

391. 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).

392. Current section 245AE of the Migration Act deals with referring an unlawful non-citizen for work. Current subsection 245AE(1) provides that a person (the ***first person***) contravenes this subsection if:

- the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and

- the first person refers another person (the prospective worker) to a third person for work; and

- at the time of the referral, the prospective worker is an unlawful non-citizen.

393. Current subsection 245AE(5) provides that a person is liable to a civil penalty if the person contravenes subsection 245AE(1). The maximum civil penalty for contravention of that provision is 90 penalty units.

394. 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.

395. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

396. This penalty 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.

397. This penalty must also be read with current 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.

398. 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. 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.

399. The effect of this note is to clarify that it is sufficient to establish that a person contravened subsection 245AE(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 245AE(1)(c) in a criminal offence.

400. This means that a person is liable to a civil penalty under new subsection 245AE(5) without knowing or being reckless as to whether a worker is in breach of the work-related condition of their work solely because of doing the work allowed by the first person, if the first person allows or continues to allow that worker to work. The application of established non-fault civil penalties in relation to contravention of work-related provisions reflects the Government's determination to address the problem of illegal work hire practices and the exploitation of migrant workers.

Item 31 Subsection 245AEA(3)

401. 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).

402. Current section 245AEA deals with referring a lawful non-citizen for work in breach of a work-related condition. Current subsection 245AEA(1) provides that a person (the ***first person***) contravenes this subsection if:

- the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
- the first person refers another person (the prospective worker) to a third person for work; and
- at the time of the referral:
  - the prospective worker is a lawful non-citizen; and
  - the prospective worker holds a visa that is subject to a work-related condition; and
  - the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which they are referred.

403. Current subsection 245AEA(3) provides that a person commits an offence if the person contravenes current subsection 245AEA(1). It further provides that the physical elements of that offence are set out in current subsection 245AEA(1). The maximum penalty for an offence under current subsection 245AEA(3) is 2 years imprisonment.

404. 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.

405. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

406. This penalty must also be read with subsection 4B(2) of the Crimes Act. 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.

407. 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.

408. 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.

409. 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) (as amended by item 18 in Part 3 of the Schedule to the Bill).

Item 32 Subsection 245AEA(5)

410. 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).

411. Current section 245AEA deals with referring a lawful non-citizen for work in breach of a work-related condition. Current subsection 245AEA(1) provides that a person (the ***first person***) contravenes this subsection if:

- the first person operates a service, whether for reward or otherwise, referring other persons to third persons for work; and
- the first person refers another person (the prospective worker) to a third person for work; and
- at the time of the referral:
  - the prospective worker is a lawful non-citizen; and
  - the prospective worker holds a visa that is subject to a work-related condition; and
  - the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which they are referred.

412. New subsection 245AEA(5) is equivalent in effect to current subsection 245AEA(5), aside from the penalty. 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.

413. This penalty must be read with section 4AA of the Crimes Act. Subsection 4AA(1) provides the meaning of penalty unit in a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears. Subsection 4AA(1) provides the amount of a penalty unit expressed in dollars, subject to indexation under subsection 4AA(3).

414. This penalty 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.

415. This penalty must also be read with current 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.

416. 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. 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.

417. The effect of this note is to clarify that it is sufficient to establish that a person contravened subsection 245AEA(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 245AEA(1)(c) in a criminal offence.

418. This means that a person is liable to a civil penalty under new subsection 245AEA(5) without knowing or being reckless as to whether at the time of the referral:

- the prospective worker is a lawful non-citizen; and
- the prospective worker holds a visa that is subject to a work-related condition; and
- the prospective worker will be in breach of the work-related condition solely because of doing the work in relation to which they are referred.

419. The application of established non-fault civil penalties in relation to contravention of work-related provisions reflects the Government's determination to address the problem of illegal work hire practices and the exploitation of migrant workers.

Item 33 Subsections 245AEB(1) and (2) (penalty)

420. This item repeals the current penalty at the foot of current subsections 245AEB(1) and (2), and substitutes a new penalty that provides for a sentence of up to five years' imprisonment, or 360 penalty units, or both.

421. This item also inserts a note at the foot of each subsection, above the penalty. The note directs 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.

422. 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 5 years' imprisonment.

423. 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.

424. 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.

425. The purpose of the amendments by item 33 is to express a contrary intention in relation to the penalties for subsections 245AEB(1) and (2), so that subsection 4B(2) of the Crimes Act does not apply. As amended, the penalty under each of subsections 245AEB(1) and (2) expressly provide that the court may impose a sentence of up to five years' imprisonment, or 360 penalty units, or both.

426. The increase from 300 to 360 penalty units is intended to align the pecuniary penalty with the pecuniary penalty available on conviction for an offence against current section 245AR (prohibition on asking for or receiving a benefit in return for the occurrence of a sponsorship related event). As a result of the amendment, the maximum pecuniary penalty of 360 penalty units is set 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 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 offset against the 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 34 Subsections 245AEB(1) and (2) (note)

427. This item amends current subsections 245AEB(1) and (2) by repealing the note at the foot of each subsection. This amendment is consequential to the amendment of the subsection 245AEB(1) and (2) penalties by item 33, whereby the note in relation to section 245AH now appears at the foot of the subsection, above the penalty.

428. This amendment reflects the current drafting convention in relation to penalty provisions, which requires a note or example to a subsection or section that has a penalty at its foot to appear before the penalty rather than after it.

Item 35 Subsection 245AK(2)

429. This item repeals the civil penalty provision in current subsection 245AK(2) and substitutes a new civil penalty provision in new subsection 245AK(2).

430. This is a technical amendment, to ensure consistency in the structure of civil penalty provisions in Subdivision C.

431. Generally, current drafting practice is for a note or example to a subsection or section with a penalty at its foot to appear before the penalty, rather than after it. This is to avoid any uncertainty about the application of section 4D of the Crimes Act and of provisions about civil penalties that depend on penalties being set out at the foot of subsections and sections.

432. Where an item in this Part repeals and substitutes an offence or civil penalty provision in order to increase or otherwise vary the associated penalty, the new provision has been drafted consistent with current drafting practice. If the remaining offences and civil penalty provisions in Subdivision C were not similarly revised, this would lead to inconsistency between current provisions and new provisions as substituted.

433. 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 for contravention of that provision under current subsection 245AK(2) is 90 penalty units. A note appears below the penalty, drawing the reader's attention to current section 486ZF of the Migration Act, which provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order, and clarifying that section 486ZF does not apply in relation to subsection 245AK(2).

434. New subsection 245AK(2) has the same effect as current subsection 245AK(2). The only substantive difference between current subsection 245AK(2) and new subsection 245AK(2) is the order in which the note to the subsection and the penalty at the foot appear. The note in relation to new subsection 245AK(2) appears above the civil penalty, consistent with current drafting practice. This amendment ensures that new subsection 245AK(2) is structured consistent with the other penalty provisions in Subdivision C.

Part 5 Enforceable undertakings for work-related breaches

Division 1 Amendments

Migration Act 1958

Item 36 After section 245AL

435. This item inserts new section 245ALA after current section 245AL of the Migration Act.

436. 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

437. 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.

438. 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.

439. 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.

440. The purpose of the amendment by item 36 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.

441. 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 VEVO 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

442. As inserted by item 36, 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.

443. 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

444. 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 defined in subsection 5(1) of the Migration Act (as amended by item 7 in Part 2 of the Schedule to the Bill).

445. 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.

446. 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

447. 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.

448. 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)).

449. 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.

450. 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 or the Australian Border Force Commissioner for the purposes of that provision.

451. 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).

452. 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.

453. 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.

454. 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

455. 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.

456. Subsection 5(1) of the Migration Act provides that ***eligible court*** means:

- the Federal Court; or
- the Federal Circuit and Family Court (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.

457. Section 113 of the Regulatory Powers Act provides that a court is a ***relevant court*** for the purposes of exercising powers under Part 6 of the Regulatory Powers Act in relation to an undertaking given in relation to a provision enforceable under Part 6, if an Act provides that the court is a ***relevant court*** in relation to that provision for the purposes of this Part.

458. 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

459. 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.

460. Publication of an enforceable undertaking provides transparency to the Australian community, demonstrating that the Minister is taking action against employers, labour hire intermediaries and other 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

461. 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.

462. 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 extends 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.

463. 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

464. 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.

465. 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.

466. 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.

467. Undertakings provide a remedy other than financial sanctions to past or prospective breaches of a provision.

468. 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.

Division 2 Application

Item 37 Application of amendments

469. 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***. Item 37 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 6 Compliance notices for work-related breaches

Division 1 Amendments

Migration Act 1958

Item 38 Before section 245AM

470. This item inserts new section 245ALB before current section 245AM of the Migration Act.

New section 245ALB – Compliance notices

471. New section 245ALB sets out a mechanism for an ***authorised officer*** to issue a compliance notice. This provides another option to deal with non-compliance (by encouraging co-operative compliance), instead of pursuing court proceedings. The purpose of new section 245ALB is to enhance the compliance and enforcement framework relating to the ***work-related offences*** and ***work-related provisions*** of the Migration Act.

472. 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. For example, a compliance notice may specify one or more of the following actions:

- establish or maintain an account to use the prescribed computer system, within such reasonable time as is specified in the notice;
- comply with section 245AEC (verifying migration status before allowing a non-citizen to work) before allowing a person to work;
- use the prescribed computer system to undertake an audit, within such reasonable time as is specified in the notice, of the matters mentioned in paragraph 245AEC(1)(b) in relation to all persons who are, at the time the notice is given, allowed to work by the person.

Scope

473. New subsection 245ALB(1) provides that new section 245ALB applies if an ***authorised officer*** reasonably believes that a person is engaging in, or has engaged in, conduct constituting a ***work-related offence*** or a contravention of a ***work-related provision***.

474. 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

475. New subsection 245ALB(2) provides that an ***authorised officer*** may give the person a compliance notice specifying action that the person must take, or must refrain from taking, to address the conduct.

476. A note immediately below this subsection clarifies that a compliance notice given under subsection 245ALB(2) can be varied or withdrawn under subsection 33(3) of the Acts Interpretation Act.

477. New subsection 245ALB(3) provides that the compliance notice may require the person to produce reasonable evidence of compliance with that notice.

New subsection 245ALB(3) – illustrative example

An authorised officer reasonably believes that Employer A1 has been allowing non-citizens who hold student visas to work shifts exceeding 60 hours per fortnight during the university semester. This would amount to a breach of the work-related condition of these non-citizens' student visas – and for Employer A1, would constitute a contravention of the civil penalty provision in section 245AC of the Migration Act.

In this scenario, the authorised officer could give Employer A1 a compliance notice that requires Employer A1 to cease allowing non-citizens to work in breach of the work-related condition of their visa. The compliance notice requires Employer A1 to conduct VEVO checks in relation to any current non-citizen employees, and to give the authorised officer evidence of the checks, including the results of those checks.

If Employer A1 does not comply with the compliance notice, the Minister could, for example, bring an action under section 486R of the Migration Act for an order that Employer A1 pay the Commonwealth a pecuniary penalty for contravention of the civil penalty provision.

478. New subsection 245ALB(4) sets out the requirements for the contents of the notice. This includes:

- the name of the person to whom the notice is given;
- the name of the ***authorised officer*** giving the notice;
- a summary of the conduct on which the notice is based;
- an explanation that failing to comply with the notice may contravene a civil penalty provision;
- an explanation of the process available to the recipient to apply for a review of the notice by the Federal Circuit and Family Court of Australia (Division 2); and
- any other matters prescribed by regulations made for the purposes of new paragraph 245ALB(4)(f).

479. A notice that is deficient may be invalid and may be reviewed by the Federal Circuit and Family Court of Australia (Division 2) under new subsection 245ALB(8).

Person must comply with compliance notice

480. New subsection 245ALB(5) provides that a person must comply with a compliance notice. This subsection is a civil penalty provision.

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

482. 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 245ALB(5) draws the reader's attention to this provision.

Effect of compliance with compliance notice

483. New subsection 245ALB(6) provides that a person who complies with a notice is not taken to have admitted to engaging in the conduct constituting the offence or contravention in relation to which the notice is given.

Relationship with civil penalty provisions

484. New subsection 245ALB(7) prevents the Minister from instituting proceedings under current subsection 486R(1) of the Migration Act to enforce a contravention of a ***work-related provision*** 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, under new subsection 245ALB(8), to the Federal Circuit and Family Court of Australia (Division 2) for a review of the notice, and that application has not been completely dealt with.

Review of compliance notice

485. New subsection 245ALB(8) provides that a person who has been given a compliance notice may apply to the Federal Circuit and Family Court of Australia (Division 2) for a review of the notice on one or more of the grounds provided at paragraphs 245ALB(8)(a), (b) or (c).

486. The first ground for review is that the person is not engaging in, or has not engaged in, the conduct specified in the notice. This ground would be relevant where the provision that is alleged to have been contravened does not apply – for example, because the alleged contravention has not occurred.

487. The second ground for review is that the conduct specified in the notice does not constitute a work-related offence, or a contravention of a work-related provision.

488. The third ground for review is that the notice does not comply with the requirements set out in new subsections 245ALB(2), (3) or (4). For example, the notice may be procedurally deficient; or it specifies action a person must take where there is no connection between the specified action and the conduct to be addressed, in relation to subsection 245ALB(1), and the related work-related offence or work-related provision.

489. A person can apply for review of a compliance notice on one or more of these grounds.

490. New subsection 245ALB(9) provides that the court may stay the operation of a compliance notice on the terms and conditions that the court considers appropriate. For example, a court could make an interim order staying the operation of the notice while it decides whether to confirm, cancel or vary the notice. In the absence of such an order, a person to whom a compliance notice is given would be required to comply with it.

491. New subsection 245ALB(10) provides that the court may confirm, cancel or vary the compliance notice after reviewing it.

Item 39 Subsection 474(4) (after table item 6)

492. This item inserts new item 6A after current item 6 in the table under subsection 474(4).

493. Section 474 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).

494. The amendment by item 39 makes clear that a decision under new section 245ALB is not a ***privative clause decision***. The insertion of new item 6A (as it refers to new section 245ALB) in the table under subsection 474(4) makes clear that a decision made under new section 245ALB is not a ***privative clause decision***.

495. The definition of ***non-privative clause decision*** in subsection 474(6) 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***.

Division 2 Application

Item 40 Application of amendments

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

497. 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.

498. 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.

499. 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.

500. 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.

501. 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 7 Other amendments

Migration Act 1958

Item 41 After subsection 140RA(2)

502. This item amends current section 140RA of the Migration Act, inserting new subsections 140RA(2A) and (2B).

503. New subsection 140RA(2A) allows the Minister to delegate the Minister's powers and functions under Part 6 of the Regulatory Powers Act, as applied to subsection 140RA(1), to an authorised officer under the Migration Act. The delegation must be in writing. ***Authorised officer*** is defined in subsection 5(1) of the Migration Act to mean an officer under the Migration Act authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision.

504. New subsection 140RA(2B) provides that the Minister may only delegate the powers and functions under Part 6 of the Regulatory Powers Act, if satisfied that the person has appropriate qualifications, training or experience to exercise the power or perform the function. Consistent with new subsection 245ALA(4), as inserted by item 36 in Part 5 of the Schedule to the Bill, 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).

505. 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 as an enforceable provision, in relation to a sponsorship obligation, 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.

506. The combined effect of new subsections 140RA(2A) and (2B) 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 sponsor monitoring and enforcement under Subdivision C of Division 3A of Part 2 of the Migration Act.

507. New subsection 140RA(2C) provides that an authorised officer exercising powers or performing functions under a delegation under subsection 140RA(2A) must comply with any directions of the Minister.

508. 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, as inserted by item 36 in Part 5 of the Schedule to the Bill.

Attachment A

Statement of Compatibility with Human Rights

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

Migration Amendment (Protecting Migrant Workers) Bill 2021

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 (Protecting Migrant Workers) Bill (the Bill) amends the *Migration Act 1958* (the Migration Act) to strengthen the Government's response to the exploitation of migrant workers in Australia, and to implement Recommendations 19 and 20 from the Report of the Migrant Workers' Taskforce (the Taskforce Report).

The Migrant Workers' Taskforce (the Taskforce) was established in 2016 as part of the Government's commitment to protect vulnerable workers. It was asked to identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation.

The Taskforce Report was released on 7 March 2019 and is available at: https://www.ag.gov.au/industrial-relations/migrant-workers-taskforce.

The Government is implementing a range of measures to respond to the Taskforce's recommendations. 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. This includes employers of international students, temporary graduate visa holders, working holiday makers, some bridging visa holders and provisional visa holders (i.e. migrant workers whose visa has not been sponsored by an employer). However, it does also increase the civil penalties available under the Employer Sponsorship Framework. That is, the framework regulating

the specific obligations on employer sponsors – those employers who sponsor the visa of non-citizens for the purpose of filling certain labour gaps.

The Government released an exposure draft of the Bill on 26 July 2021 inviting stakeholders to provide feedback on the new measures. The public submissions have been published on the Department's website for maximum transparency.

Feedback on the exposure draft has given the Government the opportunity to refine key components of the Bill, including clarifying key measures and addressing issues of concern.

The public submissions reflected a diverse range of views from peak bodies, industry and civil society. Some stakeholders expressed frustration about the limited scope of the Bill, which focuses primarily on implementing recommendations 19 and 20 from the Taskforce Report (Department-led recommendations). Some stakeholders provided dissenting views about the reforms needed, contesting the recommendations from the Taskforce Report. Other stakeholders articulated their support for the reforms, and acknowledged that the Bill addresses recommendations 19 and 20 from the Taskforce Report, and in doing so, it contributes to whole-of-government initiatives to combat migrant worker exploitation.

The Bill enhances the role of the Migration Act in combatting migrant worker exploitation by supporting visa program integrity. The national workplace relations system, including the *Fair Work Act 2009* 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 2009*.

The Attorney-General's Department 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 for using a person's migration status to exploit them in the workplace
- a mechanism to prohibit employers that have engaged in serious or repeated non-compliance, from accessing temporary migrant workers for a period of time
- positive obligations on employers and third party providers to ensure the status and work related conditions of all migrant worker employees is verified using specified departmental systems prior to employment
- increases to pecuniary penalties for existing work-related breaches
- new compliance tools to better support the Australian Border Force to respond proportionately to cases of non-compliance.

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 non-citizen to either:

- *breach a work-related condition of their visa, or*
- *accept exploitative conditions in order to:*
    - *meet a work-related visa requirement, or*
    - *avoid being reported to the Department of Home Affairs or the Australian Border Force for fear of an adverse immigration outcome.*

The first offence relates to coercing or exerting undue influence or pressure on a 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 non-citizen to accept or agree to a work arrangement that would involve a breach of a work-related condition[1] that applies to that non-citizen's visa.

The second offence relates to coercing or exerting undue influence or pressure over a non-citizen 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, or that would result in the non-citizen 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 temporary nature of the migrant's visa status to exploit them in the workplace. The Taskforce Report outlined the reasoning behind Recommendation 19:

> *"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*

[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 1994 (the Migration Regulations) for a non-citizen to provide information or evidence 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.

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]

"There appear to be gaps in the law… For example, the Migration Act visa sponsorship laws, which seek to prevent employers extracting inappropriate advantage for obtaining a visa, do not apply to the working holiday maker visa so that no action can be taken under the Migration Act against an employer for using the restrictions attached to the visa to exploit temporary migrants…"[5]

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:

- *Backpacker exploitation: why Australia should look to the* Pacific by Stephen Howes and Henry Sherrell [6]
- *Calls for a royal commission after report reveals backpackers paid $3 an hour on NSW blueberry farms* by Caroline Riches [7]
- *Fair Work Ombudsman investigates claims of backpacker exploitation on Australian farms* [8]
- *There are no human rights here* by Katri Uibu [9]

---

[3] Taskforce Report p. 122

[4] Ibid p. 122

[5] Ibid p. 123

[6] Published 27 October 2016 online: https://devpolicy.org/backpacker-exploitation-australia-look-pacific-20161027/

[7] Published 4 December 2020: https://www.sbs.com.au/news/calls-for-a-royal-commission-after-report-reveals-backpackers-paid-3-an-hour-on-nsw-blueberry-farms

[8] Published 17 September 2020: https://www.sbs.com.au/news/fair-work-ombudsman-investigates-claims-of-backpacker-exploitation-on-australian-farms

[9] Published 15 September 2020: https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0

- *#88dayslave: backpackers share stories of farm work exploitation* by Sarah Martin [10]

- *Allegations of sexual harassment and racism as new report finds majority of backpackers are underpaid* [11]

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 2009* 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 immigration outcome 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 sanction (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 be able to adequately address the issue.

The proposed offences seek to address these gaps.

[10] Published 26 September 2019: https://www.theguardian.com/australia-news/2019/sep/26/88daysaslave-backpackers-share-stories-of-farm-work-exploitation

[11] Published 15 June 2021: https://www.sbs.com.au/news/allegations-of-sexual-harassment-and-racism-as-new-report-finds-majority-of-backpackers-are-underpaid/89407ac8-c097-49c0-9976-1cf24a81f28b

Prohibition

The Bill establishes a mechanism to prohibit an employer from allowing any additional temporary migrant workers to work for a specified period where:

- *that employer is convicted of a work-related offence against the Migration Act*
- *a court makes an order against the employer in relation to contravention of:*
    - *a work-related provision in the Migration Act, or*
    - *a specified remuneration related civil remedy provision in the Fair Work Act 2009 in their treatment of a migrant worker, or*
- *an employer has been barred from sponsoring migrant workers through the Migration Act's Employer Sponsorship Framework.*

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 *migrant worker sanctions* as defined under new section 245AYD

- 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 to support implementation of the prohibition

- 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 may declare an employer to be a 'prohibited employer' under this new mechanism are set at a high threshold. They involve either the highest level sanction available under the Employer Sponsor Framework or an adverse outcome from court proceedings.

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 allows an unlawful non-citizen to work, or a migrant worker to work in breach of the work-related conditions of their visa (and cannot demonstrate that before allowing the non-citizen to work, they took reasonable steps to check their visa status and conditions)

- 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 2009*

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.

The aim of the prohibition is to create a greater deterrence to those employers engaged in serious, repeated forms of non-compliance. It also aims to ensure that 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 of time. In doing so, the new provision, which also covers sponsoring employers, builds on an existing 'bar' available within the Employer Sponsorship Framework, which prevents employer sponsors from sponsoring non-citizen employees for work related visas to fill labour shortages.

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 *Migration Regulations 1994* (the Regulations). The Regulations may include consideration of:

- past and present conduct of the employer in their engagement with the Department

- the employer's history of non-compliance and whether the non-compliance is recurring

- the nature and seriousness of the breach
- 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.

It is intended that the prohibition will be used to address only the most serious breaches.

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; and it demonstrates that the Minister will take action against employers who have been found to breach their obligations when employing migrant workers.

Publication will also act as a deterrent to other employers, putting employers on notice that the Minister will take action to protect vulnerable migrant workers from unscrupulous employment practices.

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

- details relating to the prohibited employer (either the body corporate or the executive officer, or both, depending on the application of the prohibited employer decision),
- 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).

The Department has commissioned a Privacy Impact Assessment to support this publication process to ensure privacy concerns are addressed.

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

- 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

The consequence of non-compliance with the prohibition is a civil penalty of 240 penalty units.

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

New VEVO obligations

The Bill creates a positive obligation requiring employers, intermediaries and third party facilitators to ensure relevant departmental systems are used to verify the visa status and conditions of any prospective temporary migrant worker.

This Bill also builds on existing provisions already available under the Migration Act to strengthen the integrity of the Migration Program and ensure employers do not misuse it when filling labour shortages.

The primary aim of the proposed changes in relation to this 'positive obligation' is to:

- clarify existing obligations in relation to allowing or referring non-citizens for work, and

- outline how employers, intermediaries and third party facilitators are expected to acquit those obligations.

The overarching aim is to help employers to avoid facing potentially far more severe consequences associated with allowing or referring an unlawful non-citizen to work or a non-citizen to work in breach of a work related visa condition.

Existing obligations

Under the existing framework, there are offences for 'allowing' or 'referring' an unlawful non-citizen for work or a lawful non-citizen who would breach a work related condition of

their visa if they participated in the work.[12] These are serious offences, punishable by up to 2 years imprisonment.

Currently, an employer or third party provider is able to provide a defence for a contravention if they have used the relevant departmental systems (currently the Visa Entitlement Verification Online, or VEVO, system), or if they have undertaken other reasonable steps, to verify the non-citizen's visa status and conditions.

New positive obligation

The changes proposed in this Bill create a positive obligation on employers to undertake the necessary checks to avoid inadvertently breaching their obligations and committing those offences.

Under the new framework, an employer or third party provider is able to acquit their responsibilities by:

- registering with VEVO and logging into the system themselves to verify that any prospective non-citizen employee is lawful and would not be in breach of work related visa conditions if they were to employ them.

- obtaining information from a third party provider (such as a contracted service provider or labour hire intermediary) that provides evidence that a VEVO verification check has occurred, and that the non-citizen is lawful and would not be in breach of work related visa conditions if they were to employ the non-citizen.

- obtaining an automatically generated email from the Department, initiated by the non-citizen[13] that provides evidence, through VEVO, that the non-citizen is lawful and would not be in breach of work related visa conditions if they were to employ the non-citizen.

While the new positive obligation is a strengthening of existing expectations, the Department is seeking to minimise the impost on employers by generally allowing a degree of flexibility in the manner by which the VEVO verification can occur.

However, the amendments do require that 'required system users' must log into and use VEVO directly to determine whether a non-citizen is lawful and has permission to work. A required system user cannot rely on VEVO checks undertaken by another party.

A required system user includes:

- a former 'prohibited employer' (for a period of 12 months after their prohibited employer status ends)

- a person who is determined by the Minister to be a required system user, or

[12] Refer ss 245AB, 245AC, 245AE, 245AEA, 245AEB

[13] This can be done by the non-citizen logging into their own VEVO account and using the 'send' function.

- a class of persons specified by the Minister in a legislative instrument.

The decision to determine that a person is a required system user might arise in situations where, for example, an employer is recruiting labour directly from overseas, or where there are overseas labour hire contractors or overseas third parties supplying labour.

The new measures help employers, intermediaries and third party providers to have a level of assurance that they are acquitting their responsibilities as required under existing laws.

A new civil penalty has been introduced for failing to meet this requirement (48 penalty units).

Increases in pecuniary penalties

The Bill aligns the maximum criminal and civil pecuniary penalties for all current and proposed work-related offences and provisions to match existing penalties for unlawfully obtaining a benefit from visa sponsorship.

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 address 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 actually deters people from contravening and offending. These increased civil penalties reflect the severity of the impact of a contravention on the individual migrant worker directly affected by that act, but also the significant damage that 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 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.

This measure follows the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, which increased penalties (up to 10 times the previous amount) for 'serious contraventions'.

The public consultation on the Bill found that while some submissions argued that increasing penalty amounts is not as effective as criminal offences, the raising and alignment of penalties did not generally raise concerns.

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 Australian Border Force (ABF) new tools to address issues of non-compliance proportionately, and encouraging greater levels of voluntary compliance. The tools are modelled on those available to Fair Work Inspectors, and they 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 establishes arrangements for the Minister or the Minister's delegate to enter into an enforceable undertaking with an employer, labour hire intermediary or other party that has not complied with work-related offences and 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 enforceable undertakings in the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

Enforceable undertakings (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 issue(s) 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 in order 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 an employer.

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

- register with VEVO
- undertake an audit of all non-citizen employees to address any issues of non-compliance associated with the employment of 'illegal workers'
- provide to the ABF evidence of that audit – and information that demonstrates a move towards compliance with work related obligations under the Migration Act (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

The primary obligation for employers under the Migration Act is the obligation not to employ an unlawful non-citizen or a non-citizen in breach of work-related visa conditions (known as an 'illegal worker'). In terms of compliance, this breach is often initially addressed with an Illegal Worker Warning Notice (IWWN). An IWWN is an 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 non-citizen in breach of work related conditions.

The purpose of an IWWN is to:

- inform the recipient that they have contravened a work-related provision of the Migration Act, and
- provide information to the recipient about:
    - migration laws relating to illegal work
    - consequences of illegal work
    - 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 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 non-compliant behaviour.

A compliance notice takes that education one step further and directs 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:

- register with VEVO
- 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
- refrain from employing non-citizens who are either unlawful non-citizens, or if employed, would be 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 work with employers, labour hire intermediaries and other parties 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.

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 be free from the requirement to perform forced or compulsory labour or held in servitude - Article 8 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Right to privacy - Article 17 of the ICCPR
- The right to a fair trial and criminal process rights - Articles 14 and 15 of the ICCPR

- Right to equality and non-discrimination – Article 26 of the ICCPR.

Right to 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.*

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. 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 (under section 140M).

- The effect of the prohibition for employer sponsors is to extend the bar, prohibiting the employer from 'allowing' other temporary migrants to work (i.e. those not engaged through a sponsorship arrangement).[14]

- The effect for other employers (i.e. any employer not engaging in the employer sponsor program), is that they will be prohibited from 'allowing' any temporary migrant worker to work.

In effect, where an employer has misused the Migration Program, this new measure effectively prohibits that employer from accessing the migration program to meet labour needs for a period of time.

While some may interpret this measure as limiting the employment opportunities for temporary migrant workers, the primary focus is the behaviour of the employer, and the aim is to ensure that employer will stop engaging in exploitative work practices and misusing the Migration Program.

For temporary migrant workers, there is no penalty for working for a prohibited employer. While this new measure may limit their opportunity to work for certain businesses (i.e. prohibited employers are not allowed to employ them), the intent is to ensure employers are not misusing the Migration Program to access a cheap or exploitable source of labour.

Importantly, the new measure does not:

- prevent those temporary migrant workers from seeking employment with another employer (or intermediary or third party provider); or

- affect the employment status of existing employees.

The employer is not obliged to cease the employment of any existing employees, and if they choose to do so, the temporary migrant worker can continue working for the

[14] Sponsored migrant workers are already accounted for under the existing bar.

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

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 and related issues).[15] 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 to prohibit or not. The employer will have an ability to highlight these concerns in their response to a notice of intent to take action. This allows the Minister to take these types of considerations into account when making a decision.

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

- a person is an approved work sponsor and they are subject to a bar imposed by the Minister under paragraph 140M(1)(c) or (d) (the Employer Sponsor Framework);
- a person is convicted of a work-related offence;
- a person is the subject of a civil penalty order in relation to the contravention of a work-related provision;
- a person is the subject of an order for contravention of certain civil remedy provisions (remuneration related provisions) under the *Fair Work Act 2009* in relation to the employment of a non-citizen.

The proposal focuses on:

- those contraventions that are most serious in nature (i.e. cases decided in court); and
- addressing a gap identified in the existing Employer Sponsorship Framework (i.e. the fact that an employer sponsor barred under section140M can currently employ other temporary migrant workers, even if they are barred from sponsoring visas).

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

Any impact on a person's ability to work for a particular employer that may result from a prohibition aims to limit the exploitation of temporary migrant workers. 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.

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

Rights relating to conditions of work

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:*
>
> *…*
>
> *(b) Safe and healthy working conditions;…*

The Bill seeks to positively enhance the right to safe and healthy working conditions by combatting the misuse of Australia's migration program and the exploitation of migrant workers.

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.

Under the new criminal offences, the amendments provide migrant workers (and others) with an avenue to pursue employers who exert undue influence, pressure or coercion over migrant workers in the workplace, including in relation to work related (and health and safety related) conditions, making it a criminal offence for the employer to do so. 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 migrant worker 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 (including unsafe or unhealthy) behaviour.

The other measures included in the Bill, including the increased penalties and the prohibition, are also - broadly - aimed at promoting the right of migrant workers to enjoy just and favourable (and equitable) conditions in the workplace by ensuring employers don't misuse the migration program as an alternative source of cheap and exploitable labour.

Rights relating to forced or compulsory labour or 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 already seek to address the issue of modern slavery under the Criminal Code.

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 aggravated cases that do not meet existing thresholds for prosecution through the courts.

The measures in the Bill therefore support rights relating to forced or compulsory labour or servitude.

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 (either the body corporate or the executive officer, or both, depending on the application of the prohibited employer decision),
- 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 circumstances in which publication is not required in the regulations, 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;[16] and

[16] 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.

- puts other employers on notice and deters them from engaging in non-compliant behaviour.

In line with the Privacy Impact Assessment undertaken to inform this initiative, 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 Fair Work Ombudsman's publication of litigation outcomes
- the Australian Securities and Investments Commission's banned and disqualified people register
- the Australian Taxation Department's disqualified trustees register
- the register of convictions (Victorian Department of Health)
- the *Sport Integrity Australia Act 2020* (Cth) which allows for the publication of a person's details following a sanction

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. This will be reflected in policy. It supports a consistent approach with existing provisions in the Act.

The Government considers the prohibition measure a significant sanction. The Bill includes a number of processes to ensure that the prohibition only applies to the most serious cases of non-compliance, including restricting the triggers, incorporating processes to give the employer an ability to 'show cause' as to why the prohibition should not apply, and review rights. These processes also provide the employer with an opportunity to correct any details prior to publication. The details of the contravention would already be publicly available – whether through court records, the Fair Work Ombudsman's website, or the ABF's Register of sanctioned employers. The Government considers that the publication of the prohibited employers list would not only be lawful, but reasonable and justified.

As noted above, the Department commissioned a Privacy Impact Assessment to address privacy concerns and to ensure that the publication of the information is proportionate to the overarching aim of protecting migrant workers.

Fair trial and criminal process rights

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 it introduces a new compliance notice scheme.

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. This is the case for the new offences of coercing, or exerting undue influence or pressure over a non-citizen to accept or agree to a work arrangement in breach of a work-related visa condition or in order to avoid an adverse effect on the non-citizen's immigration status, or that would result in the non-citizen being unable to satisfy a work-related visa requirement. 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 these civil penalty provisions that are alternatives to prosecution of the two new criminal offences relating to coercion, the maximum penalty of 240 penalty units reflects the serious nature of the contravention.

While a contravention of the prohibited employer provisions does not sit alongside a criminal offence, it is linked to the most serious cases of non-compliance. Noting the severity of the circumstances that lead to a prohibition, a contravention of the prohibition is also set at a maximum penalty of 240 penalty units.

If these 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 these 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 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 provide for an additional deterrent to employers engaging in serious contraventions, where appropriate, in order to change behaviour.

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

- 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.

In effect, the prohibition seeks to protect the rights of migrant workers and to deter unscrupulous employers from misusing the migration program by using migrant workers as cheap labour. It is not intended as a limitation on the right not to be tried or punished again for an offence.

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

- breaching the requirement to ensure a migrant worker's visa status and conditions are verified using the Department's systems before employing them or referring them for employment

- failing to comply with a compliance notice.[17]

As general civil contraventions, lower penalties (48 penalty units) apply. These civil penalty provisions should not be considered criminal in nature, due to the lower penalties as well as their regulatory/disciplinary context.

Increasing pecuniary penalties for existing offences and civil penalty provisions

To the extent that increasing the pecuniary penalties for existing 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, may result in these provisions also being considered to be more 'criminal' in nature, 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 address the misuse of Australia's Migration Program through the exploitation of temporary migrant workers.

For financial penalties to have a deterrent effect, they must be set at a level that actually deters people from contravening and offending. These increased civil penalties reflect the severity of the impact of a contravention on the individual migrant worker directly affected, but also the significant damage that 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.

Right of equality and non-discrimination

This Bill may engage the right of equality and non-discrimination in Article 26 of the ICCPR, which 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.*

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, and in the case of the prohibition, on the employment of 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 specifically address the exploitation of migrant workers. In doing so, it seeks to positively enhance the right of temporary migrant workers to enjoy equitable conditions at work, as they are more likely

[17] 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.

to be in a vulnerable employment position compared to Australian citizen and permanent resident workers.

Publication of the 'prohibited employer' provisions (and prohibited employers) helps to minimise the risk of the effects of the Bill being perceived as discriminatory by providing transparency about the intent, reasons and application of the prohibition. The primary aim is to enhance the rights of temporary migrant workers and address the misuse of Australia's migration program. This will help temporary migrant workers understand why they were not able to be employed by a prohibited employer in comparison 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.

Conclusion

The measures included in the Migration Amendment (Protecting Migrant Workers) Bill 2021 support the protection of migrant workers from worker exploitation. The measures are compatible with human rights because they protect the human rights of vulnerable migrant workers in Australia. To the extent that the proposed measures may limit human rights, those limitations are reasonable, necessary and proportionate to the objective.

The Hon Alex Hawke MP

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs