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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600

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Dear Committee Secretary

Re: Submission on the Migration Amendment (Strengthening Employer Compliance) Bill 2023

On behalf of the Australian Chamber of Commerce and Industry (ACCI), I am writing to express our views and concerns about the proposed *Migration Amendment (Strengthening Employer Compliance) Bill 2023.*

The Australian Chamber of Commerce and Industry (ACCI) is the pre-eminent national organisation representing the Australian business community. As Australia's largest and most representative business network, we advocate on behalf of businesses that operate across the entire spectrum of the Australian economy.

While we appreciate the government's initiative to tackle worker exploitation and strengthen employer compliance, particularly for migrant workers, it is also essential to consider the potential challenges and impacts on the Australian businesses we represent. In light of this, we wish to propose several considerations for the Committee's review.

The Need for a Transition Period

Understanding the complexity of the proposed changes, we believe that there should be an allocated transition period that would allow businesses to make necessary adjustments. This would provide an opportunity for employers, particularly those that operate small businesses to update their processes, implement new procedures, and carry out necessary training without the threat of immediate and harsh penalties for non-compliance.

A reasonable transition period would ensure that businesses can effectively adjust to the new legislative landscape while mitigating the risk of inadvertent non-compliance. This is especially pressing given the expected changes to the temporary visa scheme and the severe penalties that are to be imposed on businesses if they are found at fault.

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A 12-month transition period, to facilitate the adaptation of small businesses to the new law, would be proportionate to the gravity of the changes being made. The transition period should also be accompanied by a relevant communication strategy to ensure employers are aware that the system has changed.

Ambiguity of the proposed offences

A significant concern of our members surrounds the 'physical' and 'fault' elements that are found in sections 245AAA (Coercing etc. a lawful non-citizen to work in breach of work-related conditions), 245AAB (Coercing etc. an unlawful non-citizen to work—adverse effect on presence in Australia), and 245AAC (Coercing etc. a lawful non-citizen to work—adverse effect on status etc.)

Physical elements – no definition of coercion

By leaving the physical elements of the offence to be interpreted by the courts, employers have been denied any reasonable clarity as to what these new offences actually entail.

What constitutes coercion, undue influence, and undue pressure in an employer's relationship with their employee has not been sufficiently established. Without a clear legal definition, employers may inadvertently commit actions that could be interpreted as coercive, without the intention to exploit their workers. This leaves employers unsure as to what behaviours, actions or contexts might be considered coercive.

Furthermore, the complexity of the employer-employee relationship means that determining what behaviour is coercive is not without difficulty. The relationship between employers and employees is inherently hierarchical, with the employer often having more power. If not precisely defined, the normal exercise of this power (for instance, reassigning an employee to a different task, enforcing company policies, or managing underperformance) might be misconstrued as coercive.

With respect to visa conditions, the expectations set out by the amendment are even more onerous. Without explicit guidelines as to what constitutes coercion in relation to enforcing these conditions, employers might unintentionally breach the legislation while trying to remain compliant with the visa rules.

Finally, when language and cultural barriers are involved, employers' attempts to communicate or enforce workplace rules may be unintentionally interpreted as coercive. This fact, combined with the ambiguity of the law itself, leaves employers with little idea as to how to run their workplaces without attracting litigation. Employers may also be left exposed to false or unnecessary claims made by disgruntled workers.

Fault elements - greater precision needed

The 'fault elements' that specifically refer to 'knowledge' and 'recklessness' have not been adequately fleshed out. These are terms that can potentially have a multitude of interpretations and will result in legal ambiguities that will cause confusion among employers. Let us expound on this in greater detail:

1. **Interpretation of 'Knowledge'**: 'Knowledge' in legal terms often presents itself as a subjective concept that has been interpreted differently across a spectrum of contexts. This raises critical questions — what level or type of 'knowledge' concerning an employee's immigration status should an employer be reasonably expected to have? What constitutes satisfactory evidence of such 'knowledge' from an employer's perspective? How should employers practically implement processes to obtain this 'knowledge'?

To elucidate with a case law reference, in *He Kaw Teh v The Queen*,[1] the court determined that proving 'knowledge' can be very complex and will be specific to the case at hand. This suggests that 'knowledge' is not a one-size-fits-all concept but instead varies in different situations. The alarming complexity present in the Australian migration system means that many employers have little understanding of the obligations imposed on them - opening them up to unfair penalisation. This is illustrated in the following hypothetical example:

> *ConstructoCo is an Australian business involved in construction. They often hire foreign subcontractors due to the specialist skills they require in the workplace.*
>
> *One of their subcontractors, Mr A, is on a temporary work visa. He is restricted to work for a specific period in a specific field.*
>
> *Mr A's visa is about to expire, but he tells his manager that he has applied for a visa extension that is currently being processed. Based on this information, the manager assumes that Mr. A can continue in his employment until the extension is approved. Accordingly, the manager encouraged Mr A to continue in his employment and finish his contract.*
>
> *Yet, under Australian immigration law, a temporary visa holder cannot work when their visa has expired, irrespective as to whether they've applied for an extension.*
>
> *This means that the manager and ConstructoCo are in violation of the law and may be seen as coercing Mr. A into continued employment.*

[1] *He Kaw Teh v The Queen* [1985] HCA 43 - 157 CLR 523

If the court can prove that ConstructoCo and the manager had the means to confirm Mr. A's immigration status, but did not take this action, this could be interpreted as having 'knowledge' of an employee's expired immigration status, even if they did not know that Mr. A's visa had expired.

By encouraging Mr A to continue his work in violation of immigration law, it is not unforeseeable that the court could interpret this as an instance of coercion.

Such a case demonstrates the complexities that employers face when interpreting and applying their 'knowledge' of an employee's visa status.

Simply leaving this ambiguous decision-making process on 'knowledge' to the judiciary almost guarantees non-compliance, as businesses will not be certain of what is permitted in the law and what is not.

To bring about a sense of certainty and consistency, it is essential to include comprehensive guidelines that detail the expected level of 'knowledge' employers should have and how to practically achieve and demonstrate such 'knowledge'.

2. **Interpretation of 'Recklessness'**: Similarly, 'recklessness' brings its own set of challenges in terms of legal interpretation. This is exemplified in the case of *R v Crabbe,*[2] where the court deemed a person to act recklessly if they are aware of a substantial risk that harmful consequences may occur and yet choose to proceed. When adapting this definition to the context of immigration law, a cloud of uncertainty forms over what actions, or lack thereof would qualify as 'recklessness' on the part of an employer. What amount of risk in managing an employee is substantial? How does an employer determine whether they are approaching or crossing this undefined threshold of coercion?

Given these ambiguities, it is crucial that precise definitions and comprehensive interpretative guidelines for these terms — 'knowledge' and 'recklessness' — are integrated into the legislation. By doing so, it will provide greater clarity and a stronger sense of legal certainty for employers.

In addition, providing real-life examples or scenarios, where possible, could further aid in making these terms more understandable and relatable for employers. This way, they can better grasp the implications and ensure their practices are aligned with the expectations of the law.

As a final point, we suggest the development of a comprehensive guide or resource for employers that clearly illustrates the practical applications of these 'fault elements'

[2] *R v Crabbe* [1985] HCA 22

and provides guidance on how to avoid legal pitfalls. By doing so, we believe that it would foster a more cohesive, comprehensible, and fair implementation of the proposed legislation for employers and employees.

The Potential Administrative Burden and Increased Costs

The proposed Bill will likely impose a significant administrative burden on businesses, particularly small and medium-sized enterprises. Ensuring compliance with these regulations will require comprehensive tracking of employees' visa statuses and stringent monitoring of work-related conditions. While the Visa Entitlement Verification Online (VEVO) website is operational, it suffers from a lack of awareness from employers and should be more widely promoted. Additionally, the costs associated with implementing systems and procedures to ensure compliance could pose an additional financial burden, especially for smaller businesses operating on tight margins.

We suggest that government consider introducing support measures such as clear guidelines, access to legal resources, or financial assistance for implementing necessary changes. This could help alleviate the burden on businesses and ensure a smoother transition to the new system.

The Impact on Hiring Practices and Workforce Availability

With increased penalties for non-compliance, there is a risk that businesses may become hesitant to hire visa holders. This could result in additional workforce shortages, particularly in sectors heavily reliant on migrant labour. This risk is especially significant given the simultaneous proposed changes to the visa system for temporary skilled visa holders.

Clear, easily accessible information on workers' rights and visa conditions, as well as robust support systems for employers, would be beneficial in this regard to be supplied by Home Affairs to both employees and employers.

Prohibited Employers

Given the high potential for non-compliance during the complex changes to the visa system, the prohibited employer clause further justifies a transition period.

Employers should not be blacklisted permanently owning to a mistake made during a wide-reaching change to the visa system – a system that is already mired in complexity.

Employers must not be designated as ‘prohibited’ at any stage prior to issuance of accessible and simple guidelines that outline the new obligations faced by their business.

Issue of Executive Officers

ACCI is also concerned about the lack of clarity around the liability of executive officers. Guidelines that demonstrate the situations where an executive officer of a firm will be found to have coerced their workers must be provided to Australian enterprises.

Final Remarks

In conclusion, while we commend the government's efforts to strengthen employer compliance and protect the rights of migrant workers, we urge the Committee to consider the potential challenges and impacts on Australian businesses. Striking a balance between safeguarding employees' rights and maintaining a favourable business environment is crucial. We believe that with further refinement, the Migration Amendment (Strengthening Employer Compliance) Bill 2023 can achieve this balance.

Most importantly, the ACCI calls for a 12-month transition period after the bill is passed to facilitate the adaptation of small businesses to the new law.

We appreciate the opportunity to contribute to this important discussion and are willing to provide further information or clarification as needed. ACCI remains committed to assisting in any way to ensure the development of effective, fair, and balanced legislation.

Yours sincerely,

Natalie Heazlewood
Director, Skills, Employment, and Small Business