



## Migration Amendment (Employer Sanctions) Bill 2006

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Law and Bills Digest Section

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## Migration Amendment (Employer Sanctions) Bill 2006

**Date introduced:** 29 March 2006

**House:** Senate

**Portfolio:** Immigration and Multicultural Affairs

**Commencement:** Sections 1 to 3 commence on Royal Assent. Schedules 1 and 2 commence on a day fixed by proclamation or 6 months after the day of Royal Assent, whichever occurs first.

### Purpose

The Migration Amendment (Employer Sanctions) Bill 2006 ('the Bill') provides for a scheme of sanctions relating to employers, labour suppliers and others who knowingly or recklessly employ illegal workers or refer them for work.

### Background

The Bill inserts a new Subdivision C into Part 2 of the *Migration Act 1958* which provides for controls on the arrival and presence of non-citizens. It creates a series of new offences for employers, labour suppliers and others. The offences are aimed at persons who employ or refer for work anyone who is an unlawful non-citizen or non-citizen who has breached the work conditions of their visa. **Schedule 1** of the Bill contains these new offences. **Schedule 2** contains related amendments to the *Crimes Act 1914* and the *Migration Act 1958*.

### Review of Illegal Workers in Australia in 1999

In 1999, a study was conducted to gauge the problems associated with illegal workers in Australia. It resulted in a report—*Review of Illegal Workers in Australia: improving immigration compliance in the workplace*. The purpose of the review was to 'curb the abuse of Australia's visa system by illegal workers and a determination to reduce unemployment for Australians. The Minister was keen to see measures developed that would reduce the burden on Australian taxpayers and maintain the integrity of Australia's borders.'<sup>1</sup>

The report found that there was a significant problem associated with the numbers of illegal workers in Australia denying opportunities for Australians to access jobs as well as placing 'additional burden on the Australian taxpayer in terms of compliance costs, uncollected taxes and fraudulently claimed social security benefits.'<sup>2</sup> Amongst the

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report's recommendations was that a system of sanctions be introduced in relation to employers and labour suppliers and that there be a range of offences and penalties reflecting the seriousness of the offences committed. It also recommended an infringement notice for lesser offences.

At present, unlawful non-citizens who work in Australia commit an offence under section 235 of the Migration Act. Section 235 also penalises non-citizens who work in breach of their visa conditions. No primary offences apply to employers or others who allow non-citizens to work illegally. However, it may be possible to prosecute such employers using ancillary offences. The Review discussed ancillary offences relating to employers or labour suppliers under section 5 of the Crimes Act (now section 11.2 of the Commonwealth Criminal Code) where a person who knowingly aids or abets, directly or indirectly, the commission of an offence under Commonwealth law is also guilty of that offence. The Review commented that prosecutions rarely occurred under this provision for the following reasons:

- the difficulty in obtaining supporting witnesses
- insufficient evidence to prove an element of knowledge on the part of the employer, and
- the chain of evidence required to meet prosecution standards.<sup>3</sup>

## Initiatives to Stop Illegal Workers

In November 2000, the then Minister for Immigration and Multicultural Affairs introduced the next phase of the Review of Illegal Workers in Australia, *Initiatives to Stop Illegal Workers*. The initiatives included a new Work-Right Information Telephone Line, a fax-back facility that provided advice on whether an individual was eligible to work, an employer awareness campaign including new kits and information pamphlets to enable employers and labour suppliers to improve their knowledge of work rights issues, and the introduction of warnings to employers and labour suppliers who hire illegal workers. A graded system of sanctions was foreshadowed for the end of 2001.<sup>4</sup>

## Illegal Worker Warning Notice

The Department of Immigration and Multicultural Affairs (DIMA) issues warning notices to employers and labour suppliers when DIMA becomes aware that an illegal worker has been employed or referred for work. A notice is issued for each illegal worker. DIMA keeps records of the notices issued and they are taken into account when deciding whether to issue an infringement notice or refer matters for prosecution.<sup>5</sup> The notice advises the employer or labour supplier that they have employed an illegal worker and that there is a possibility of further prosecution. In 2004-05 the DIMA issued 2,280 warning notices to employers and labour suppliers. This was an increase of 20% over the previous financial

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year.<sup>6</sup> Ninety employers received more than one notice and most notices issued occurred within the following industries:

- accommodation, cafes and restaurants
- manufacturing
- agriculture, forestry and fishing
- retail trade, and
- personal and other services (sex industry).<sup>7</sup>

### Press Comment

Media reports indicate the Uniting Church has expressed concern over the Bill in that it could expose charities to large fines if they allow people on bridging visas to do volunteer work in the community: ‘The changes could condemn these people to an idle life, with little involvement in the community.’<sup>8</sup> Some bridging visas have work rights while others do not. The National Farmers’ Federation workplace relations manager considered that there are enough protections in the Bill to prevent farmers being charged for unintentionally hiring illegal workers in the harvest season.<sup>9</sup> The Australian Taxi Industry Association (‘ATIA’) was disappointed that it was not consulted: ATIA executive director Blair Davies has been reported as saying he ‘would be wary of an approach that placed the onus on a cab owner to search an immigration database to check a driver’s visa conditions.’<sup>10</sup>

### Political Party Comment

The ALP supports having sanctions on employers and labour suppliers who knowingly employ or refer for work illegal workers and who are either unlawful non-citizens or non-citizens breaching the work conditions of their visa. Former Opposition Leader, Mark Latham, pointed to the lack of sanctions for employers in 2004 when he stated that ‘under the Howard Government there are no effective sanctions for employers hiring illegal migrant workers. Labor will introduce legislation to penalise employers who do so knowingly.’<sup>11</sup> This stance was again reiterated by the former Shadow Minister for Immigration, Mr Laurie Ferguson, when he stated that ‘Labor is committed to ensuring strict compliance and implementing sanctions regarding both employers and overseas workers. Under a Labor Government, we will introduce measures to efficiently and effectively crack down on the black economy.’<sup>12</sup> He listed as one of the options to introduce legislation to penalise exploitative employers.

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## Current Sanctions

As stated above, unlawful non-citizens who work illegally and non-citizens who breach the work conditions of their visa commit an offence under section 235 of the Migration Act. The penalty under section 235 is a fine not exceeding \$10,000. Section 11.2 of the Criminal Code means that an employer who aids or abets the commission of a section 235 offence is also liable to a fine of not more than \$10,000.

## Situation Now

The explanatory memorandum states that the problem of illegal workers is a significant one that denies Australians opportunities to gain employment and can result in exploitation of non-citizens. It states that the Government is also concerned because of the association with cash economy industries and the consequent abuses of Australia's tax, employment and welfare laws. It mentions also that the absence of effective penalties encourages people smuggling and trafficking activities for the purpose of illegal work. As of December 2005, it is estimated that there are 46,000 overstayers and of these 26,200 have been in Australia unlawfully for more than 5 years.<sup>13</sup>

## Proposed Offences

The Bill contains eight fault-based criminal offences relating to employing and referring non-citizens for work. The offences apply if the employer or labour supplier knows or is reckless about the fact that a worker is either an unlawful non-citizen or a non-citizen in breach of a visa condition. The explanatory memorandum outlines the reach of the proposed offences:

The proposed offences need to capture the range of non-traditional work relationships found in the construction, taxi and sex industries where many illegal workers are found. For example, owners of taxicabs often lease or bail their vehicles to drivers. If the proposed offences only applied to persons who "employ" illegal workers, taxi owners who knowingly allow an illegal worker to drive their cabs would not be captured. Similar problems exist in the sex industry where some brothel owners claim to be renting rooms to their sex workers instead of providing employment.<sup>14</sup>

The offences are:

1. allowing an unlawful non-citizen to work
2. this offence is considered an aggravated offence if the illegal worker is being exploited
3. allowing a non-citizen to work in breach of a visa condition

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4. this is considered an aggravated offence if the illegal worker is being exploited
5. referring an unlawful non-citizen for work
6. an aggravated offence is committed if the illegal worker being referred will be exploited
7. referring a non-citizen for work in breach of a visa condition
8. an aggravated offence will be committed if the prospective illegal worker will be exploited.

The explanatory memorandum also comments that it is expected that first time offenders would be given a written warning rather than being prosecuted.<sup>15</sup>

## Penalties

The penalty for each offence is two years imprisonment and for an aggravated offence five years imprisonment. The explanatory memorandum also points to the fact that these penalties are to be read in conjunction with sections 4AA and 4B of the Crimes Act. Section 4AA defines a penalty unit.

In Commonwealth legislation where a term of imprisonment is prescribed as a penalty, section 4B of the Crimes Act provides that a court may if it thinks it appropriate in the circumstances, unless there is a contrary intention in the legislation, impose a pecuniary penalty instead of a prison sentence, or indeed it may impose both a pecuniary penalty and a term of imprisonment. The formula for calculating the pecuniary penalty for a natural person is contained section 4B as follows:

Term of imprisonment in months X 5

For a **2 year imprisonment** the pecuniary penalty would be  $24 \times 5 = 120$  penalty units

Penalty unit = \$110 as defined in section 4AA

Pecuniary penalty not exceeding \$13,200.

For a **5 year sentence of imprisonment** for an aggravated offence the pecuniary penalty would be  $60 \times 5 = 300$  penalty units

Pecuniary penalty not exceeding \$33,000.

For a **body corporate** the pecuniary penalty is five times the amount imposed on a natural person for the same offence (section 4B(3))

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For a two year term of imprisonment the pecuniary penalty would be not exceeding \$66,000.

For a five term of imprisonment the pecuniary penalty would be not exceeding \$165,000.

Important fault elements in the proposed offences are that the person knows or is reckless about the fact that the worker is working illegally, and in the case of the aggravated offences, that the worker is being exploited. Section 5.4 of the Commonwealth Criminal Code defines recklessness as follows:

#### **5.4 Recklessness**

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

## **Financial implications**

Financial implications may arise if prosecutions are pursued under the new provisions. For example, in relation to the 90 cases where employers or labour suppliers have infringed the provisions on several occasions and continue to do so after the legislation has come into effect, pursuing prosecutions of these people may significantly impact on litigation costs.

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## Standing appropriations

The explanatory memorandum states that the Bill will have minimal financial impact and that any additional costs associated with implementing and administering the new provisions of the Migration Act will be absorbed within current funding arrangements.

## Main provisions

### Schedule 1 – Employer Sanctions

**Subdivision C** Offences in relation to persons who allow non-citizens to work, or refer non-citizens for work, in certain circumstances.

New Subdivision C of Division 12 of Part 2 of the *Migration Act 1958* creates new offences to which employers and labour suppliers will now be subject when employing or referring non-citizens for work.

**Proposed section 245AA** provides an overview of the new Subdivision C and refers to other sections where relevant terms are defined.

#### **Allowing an unlawful non-citizen to work**

**New subsection 245AB(1)** creates an offence if a person allows a worker to work, knowing or being reckless to the fact that the worker is an unlawful non-citizen. The offence becomes an aggravated offence under **new subsection 245AB(2)** if the worker is being exploited and the employer knows or is reckless as to that fact. The penalty is 2 years imprisonment or 5 years imprisonment for an aggravated offence (**new subsection 245AB(3)**)

#### **Allowing a non-citizen to work who is in breach of a visa condition**

**New subsection 245AC(1)** creates an offence for an employer who employs and continues to employ a person and who knows or is reckless about the fact that the person is a non-citizen whose visa does not allow them to work. An aggravated offence is committed (**new subsection 245AC(2)**) if the employed illegal worker is being exploited and the employer knows or is reckless about that fact. The penalties are the same as for **new section 245AB**.

#### **Referring an unlawful non-citizen for work**

**New subsection 245AD(1)** creates an offence for a labour supplier to refer a prospective worker for work, knowing or being reckless to the fact that the worker is an unlawful non-citizen. The penalty is a maximum of 2 years imprisonment (**new paragraph 245AD(3)(b)**). If the labour supplier knows or is reckless to the fact that the worker

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referred is being exploited, they have committed an aggravated offence under **new subsection 245AD(2)** punishable by a maximum penalty of 5 years imprisonment (**new paragraph 245(3)(a)**). A court may apply a pecuniary penalty instead of imprisonment or both a fine and custodial sentence.

### **Referring a non-citizen for work in breach of a visa condition**

A labour supplier commits an offence under **proposed subsection 245AE(1)** if they refer a prospective worker for work, knowing or being reckless to the fact that the worker will be in breach of the work conditions relating to their visa. The maximum penalty is imprisonment for 2 years (**new paragraph 245AE(3)(b)**). An aggravated offence is committed by a labour supplier who knows or is reckless to the fact that the non-citizen referred for work will be exploited (**new subsection 245AE(2)**). The maximum penalty is 5 years imprisonment (**proposed subsection 245AE(3)(a)**). A court may apply a pecuniary penalty instead of imprisonment, or both a fine and custodial sentence.

### **Situations where Subdivision C does not apply**

**New section 245AF** clarifies the situations where the new Subdivision C does not apply. These situations are:

- a detainee in immigration detention involved in volunteer work approved in writing by the Secretary of the Department of Immigration and Multicultural Affairs. The explanatory memorandum comments that detainees are currently given opportunities for voluntary activities in which they can earn merit points, which forms an important aspect of the management of immigration detainees. The detention service provider would not be committing an offence under the proposed provision
- a prisoner in a Commonwealth, state or territory prison or remand centre who is an unlawful non-citizen or a non-citizen in breach of the work conditions of their visa and who is engaged in work activities as a prisoner
- a person complying with a sentence or an order under section 20AB(1) of the *Crimes Act 1914*. These orders include community service orders, work orders and periodic detention orders. A person allowing a person to comply with such orders does not commit an offence under these provisions; or
- a person complying with any of the orders under the law of a state or territory listed in **new paragraph 245(c)(ii)**. These orders include community service orders, work orders and periodic detention orders. Any person who allows a person to comply with the orders listed does not commit an offence under these provisions.

**New section 245AG** defines ‘work’ and ‘allows to work’. Work includes any voluntary work as well as paid work or work for some other reward such as food or accommodation. The definition of ‘allows to work’ includes the following:

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- a person who employs a second person under a contract of service. This is the usual employer-employee relationship (**new paragraph 245AG(2)(a)**)
- a person who engages a second person under a contract for services. This refers to the situation where an independent contractor is engaged. Matters in a domestic context are excluded such as householders engaging an electrician or a plumber (**new paragraph 245AG(2)(b)**)
- where a person bails or licenses a chattel, that is, an article of movable property to a second person or another person with the intention that the second person will use the property as a part of a transportation service such as a taxi or a chauffeured hire car (**new paragraph 245AG(2)(c)**). Although there may not be a contractual relationship between the owner of the chattel and a second person who is not the driver, the owner “allows” the driver to work if he intends that the driver is to drive the taxi
- where the first person leases or licenses premises or part of premises to a second person or another person with the intention that the second person will use those premises to perform sexual services. This provision will include brothel owners who rent rooms to sex workers rather than providing employment (**new subsection 245AG(2)(d)**). In relation to **new paragraph 245AG(2)(d)**, **new subsection 245AG(3)** defines premises as including an area of land or other place that is enclosed or otherwise, a vehicle or a vessel as well as a building.

**Proposed section 245AH** provides a definition of ‘exploited’. ‘Exploited’ means being in a condition of ‘forced labour’, ‘sexual servitude’ or ‘slavery’ in Australia. These terms are, in turn, defined by reference to relevant sections of the Commonwealth Criminal Code (**new section 245AI**).<sup>16</sup>

**New section 245AJ** provides a geographical extension to offences created by new sections 245AB, 245AC, 245AD and 245AE. The effect of section 15.2 of the Criminal Code is that a person will commit one of the new offences if they employ or refer persons for work outside Australia and then those workers subsequently come to work in Australia.

**New section 245AK** governs situations when aggravated offences are being tried.

- if the prosecution intends to prove an aggravated offence under **new sections 245AB or 245AC**, the charge must allege that the worker has been exploited (**proposed new subsection 245AK(1)**)
- if the prosecution wishes to prove an aggravated offence under **new sections 245AD or 245AE**, the charge must allege that:
  - the worker has been or will be exploited in the work they were referred to do, or
  - the worker has been or will be exploited doing other work for the person they were referred to (**proposed new subsection 245AK(2)**)

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- if the court is not satisfied as to the guilt of a person for an aggravated offence they may find the person guilty of the lesser offence (**new subsection 245AK(3)**).

**Item 2 Application** relates to the time at which the amendments proposed by **Schedule 1** take effect. Employers or labour suppliers who allow unlawful non-citizens or non-citizens in breach of the work conditions of their visa to work or refer them to work will commit an offence. The referral is made or a person begins to be allowed to work on or after the date of commencement of the provisions of **Schedule 1**. The provisions do not apply to employers or labour suppliers who employ or refer non-citizens for work prior to the commencement of these provisions.

## Schedule 2 – Related amendments

**Item 1** inserts a reference into section 15Y of the Crimes Act relating to aggravated offences against the new Subdivision C of Division 12 Part 2 of the Migration Act. Section 15Y of the Crimes Act contains a list of proceedings to which Part IAD – Protection of Children in Proceedings for Sexual Offences applies. The protections for children include:

- evidence of a child’s sexual reputation or experience is inadmissible unless given leave by a court
- cross-examination of children, and
- special facilities for child witnesses and complainants to give evidence.

**Items 2 and 3** insert a reference at the end of sections 235(1) and 235(3) of the Migration Act to Subdivision C offences. Section 235 relates to offences committed by non-citizens relating to work.

**Item 4** inserts new subsection 234(7) at the end of section 235 to ensure that section 235 is consistent with Subdivision C. The new subsection clarifies that certain activities are not considered work for the purposes of section 235. The list of activities is identical to those in section 245AF of Subdivision C.

## Endnotes

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1. Department of Immigration and Multicultural Affairs, *Review of Illegal Workers in Australia: improving immigration compliance in the workplace*, 1999, para.1.2.3.
2. *ibid.*, p. iii.
3. *ibid.*, para. 3.5.2.

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4. Hon Phillip Ruddock MP, Press release, *Initiatives to Stop Illegal Workers*, 30 November 2000, Department of Immigration and Multicultural Affairs Annual Report 2000-2001, at p. 28.
5. MSI 297: Instructions for compliance officers issuing illegal worker warning notices to employers and labour suppliers at p. 9 of 15.
6. Department of Immigration and Multicultural and Indigenous Affairs, Annual Report for 2004-2005, p. 119.
7. *ibid.*
8. Sophie Morris, Illegal-labour bill worries charities, *Australian Financial Review*, 31 March 2006, p. 23.
9. Sophie Morris, Reckless employers risk jail in illegal labour bill, *Australian Financial Review*, 30 March 2006, p. 6.
10. *ibid.*
11. Press release, Leader of the Australian Labor Party, Mark Latham, *Labor to crack down on illegal workers*, 18 January 2004.
12. Press release, Shadow Minister for Immigration, Mr Laurie Ferguson MP, *Hull Bells the Cat on Illegals*, 28 April 2005.
13. Explanatory Memorandum, Migration Amendment (Employer Sanctions) Bill 2006 at para. 2.3 and 1.2.
14. *ibid.*, at para. 4.4.9.
15. *ibid.*, at para. 4.4.10.
16. Section 73.2(3) of the *Criminal Code 1995* defines 'forced labour' ***forced labour*** means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:
  - (a) is not free to cease providing labour or services; or
  - (b) is not free to leave the place or area where the person provides labour or services.

#### Section 270.4 Definition of ***sexual servitude***

(1) For the purposes of this Division, *sexual servitude* is the condition of a person who provides sexual services and who, because of the use of force or threats:

- (a) is not free to cease providing sexual services; or
- (b) is not free to leave the place or area where the person provides sexual services.

(2) In this section:

*threat* means:

- (a) a threat of force; or

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(b) a threat to cause a person's deportation; or

(c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

- Section 270.1 of the Criminal Code 1995 defines 'slavery'

270.1 Definition of *slavery*

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

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