Australian Government

Department of Immigration and Multicultural Affairs

28 April 2006

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Curtis,

Thank you for your letter of 27 April 2006 on behalf of the Senate Legal and Constitutional Committee seeking clarification on two issues concerning the *Migration Amendment (Employer Sanctions) Bill 2006*.

The department's response to the Committee's questions is at **Attachment A**.

Please do not hesitate to contact me should the Committee require any further information to assist with its inquiry.

Yours sincerely,

(Neil Mann)
First Assistant Secretary
Compliance Policy and Case Coordination Division

Question 1

At page 4 of the transcript, the Australian Chamber of Industry and Commerce put [sic] raised the following query in relation to the application of the bill:

> **Mr Balzary**—We have put this forward as an issue that we think is covered but on which I am seeking clarification. With respect to an organisation that uses a subcontracting type arrangement—for example, a labour hire company which utilises someone's labour in their own right—the actual host organisation may not be fully aware of who is on site, and it is not their responsibility to check the validity of the basis on which they are operating. So with regard to the example of entity A contracting entity B to provide a service, and entity B subcontracting to individual C, we are concerned about whether this means—we don't think this proposal does, but we are making sure that it doesn't—that the principal contractor, party A, is not covered under this arrangement. They are not the employer; they are basically the subcontractor. So we are trying to see whether, particularly in some of the mine sites or where contracting does occur, the principal company that outsources a whole range of their operations is ultimately responsible. From that point of view, the 'knowingly and recklessly' arrangement would apply to entity B in our example. We think, from our reading, that that is the case, but we are just not sure.

Is the Department able to provide any clarification on the obligation of a principal in verifying the working rights of sub-contractors, in the case of a principal-contractor-sub-contractor relationship?

Answer 1

In the department's view, the offences in proposed sections 245AB and 245AC would not apply to a principal (person A) who engages a contractor (person B) who in turn engages a subcontractor (person C) who is an unlawful non citizen or a non-citizen working in breach of their visa conditions. This is because none of the relationships in proposed paragraphs 245AG(2)(a) and 245AG(2)(b) would exist between person A and person C. The relevant contract under which person C would be "allowed to work" would be between person B and person C. The fact that that the offences are not intended to apply to person A in this scenario is explained in paragraph 31 of the Notes on Individual Clauses of the Explanatory Memorandum.

Question 2

In their submissions both the Australian Catholic Migrant and Refugee Office and the Australian Chamber of Industry and Commerce have raised questions as to whether, in complying with the bill, employers may expose themselves to breaches of anti-discrimination legislation.

Could the Department respond to those concerns?

Answer 2

Regardless of whether the offences become law, employers should not use race or ethnic origin as a basis for requesting proof of work entitlements. These factors do not indicate immigration

status in a multicultural society and have no relevance to the question of whether a job applicant is an illegal worker.

To avoid discrimination employers should either ask all job applicants for proof of work entitlements so that all applicants are treated equally, or only rely upon factors that suggest a person may not have work rights, such as a comment by a job applicant that they are only visiting Australia.

The department's information campaign on the new offences would emphasise that employers should not use race or ethnic origin as a basis for requesting proof of work entitlements.