QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 13 FEBRUARY 2012

IMMIGRATION AND CITIZENSHIP PORTFOLIO

(AE12/0240) Program 3.1: Border Management

Senator Xenophon asked:

If an airline allowed a crew member to work on domestic sectors that had no reasonable connection with the international flight on which the crew member arrived in or departed from Australia, would that constitute an offence under section 245AB or 245AC of the *Migration Act 1958*?

Answer:

Section 245AB of the *Migration Act 1958* provides:

> *(1) A person commits an offence if:*
> *(a) the person allows, or continues to allow, a person (the* worker*) to work; and*
> *(b) the worker is an unlawful non-citizen; and*
> *(c) the person knows that, or is reckless as to whether, the worker is an unlawful non-citizen.*

On the assumption that the question is asked in the context of the crew member being the holder of a visa, no offence would be committed under section 245AB because it only applies to unlawful non-citizens.

Section 245AC provides:

> *(1) A person commits an offence if:*
> *(a) the person allows, or continues to allow, a person (the* worker*) to work; and*
> *(b) the worker is a non-citizen and the person knows of, or is reckless as to, that circumstance; and*
> *(c) the worker holds a visa that is subject to a condition restricting the work that the worker may do in Australia, and the person knows of, or is reckless as to, that circumstance; and*
> *(d) the worker is in breach of the condition and the person knows of, or is reckless as to, that circumstance.*

For the offence in section 245AC to be made out, it would be necessary for the crew member to hold a visa that is subject to a condition restricting the work he or she may do in Australia and for that crew member to be in breach of such a condition.

Additionally to prove knowingly or recklessly employing a non-citizen in breach of their conditions would require both Employer Compliance information to have been provided to the employer and Illegal Worker Warning Notices (IWWNs) to have been issued to them for previous breaches.

The (airline crew) special purpose visa is not, however, subject to a condition restricting the work the holder of that visa may undertake.

For completeness, subregulation 2.40(4) of the *Migration Regulations 1994,* which is the only provision in the Act and the Regulations that specifically deals with the work a special purpose visa holder may do in Australia, does not act as a condition, nor is it a condition, on special purpose visas. It merely provides that certain special purpose visa holders will lose their prescribed status (which will have consequences for their continuing to hold a special purpose visa) if they perform work in Australia other than work of a kind that he or she normally performs in the course of their duties. The answer in AE12/0238 provides more information on this subregulation.

If a special purpose visa holder ceased to hold that visa because of the operation of subregulation 2.40(4), and then became an unlawful non-citizen, an offence under section 245AB of the Act might be made out against their employer if the employer allows, or continues to allow, the unlawful non-citizen to work and they know the person is an unlawful non-citizen or are reckless as to that fact. In order to secure a conviction, it would be necessary to establish the elements of the offence to the criminal standard of proof which is beyond a reasonable doubt.