

CHAPTER 2

OVERVIEW OF THE BILL

Background to the bill

Current policy measures

2.2 The Regulatory Impact Statement, contained in the Explanatory Memorandum, details the prevalence of illegal workers in Australia, and the cost of compliance activities by the Department for Immigration and Multicultural Affairs (the Department) in respect of illegal workers.¹ The Explanatory Memorandum notes that there are currently a number of policy measures in place, administered by the Department, which are designed to reduce the number of illegal workers in Australia.² These measures are:

- the Employer Awareness Campaign (EAC) – an information campaign for educating employers about not recruiting people without working rights and outlining how to check a person's working rights;
- the Entitlement Verification Online (EVO) facility – an internet based service which enables employers to check a non-citizen's working rights;
- the Fax-Back Facility – a free call service enabling employers to check the working rights status of non-citizen employees; and
- Illegal Worker Warning Notices – administrative warnings issued to employers and labour referral services found to engage or refer illegal workers.

2.3 The Explanatory Memorandum notes that while these current measures have been useful for employers who prefer to do the right thing, they do not discourage those employers who are willing to breach immigration laws.³

Options for future policy development

2.4 The Regulatory Impact Statement canvasses a number of options for addressing the problem of employers or labour referral services hiring or referring illegal workers, including:⁴

- continuing current compliance activities by the Department;
- continuation of the EAC program;

1 Explanatory Memorandum, paragraphs 2.8 – 2.9.

2 Explanatory Memorandum, paragraph 3.6.

3 Explanatory Memorandum, paragraph 3.7.

4 See Explanatory Memorandum, Part 4.

- continuation of the EVO facility;
- introducing more effective offences aimed at employers and labour suppliers;
- pursuing joint fieldwork activities with other agencies such as Centrelink and the Australian Taxation Office; and
- extending working rights for temporary visa holders.

Consultation with stakeholders

2.5 The Explanatory Memorandum indicates that consultation has been taking place between the government and stakeholders on this issue for some time.⁵ The outcome of that consultation was that, while each option for policy development listed above is an option in and of itself, they are also complementary. The Explanatory Memorandum states that 'a combination of approaches is favoured' (although it is not clear by whom this approach is favoured – the Government or the stakeholders).⁶

2.6 The option of extending working rights for temporary visa holders was rejected outright.

Main Provisions

2.7 **Item 1 of Schedule 1** inserts a new **Subdivision C** at the end of Division 12 (Offences in relation to entry into, and remaining in, Australia) of Part 2 (Control of arrival and presence of non-citizens) of the Act.

2.8 Proposed **subsection 245AB(1)** creates an offence where a person allows an unlawful non-citizen (the *worker*) to work. In order for the offence to be made out the person must know, or be reckless as to whether, the worker is an unlawful non-citizen.

2.9 The offence in subsection 245AB(1) is an aggravated offence if the person knows that the worker is being 'exploited', or is reckless as to the worker being exploited (see proposed **section 245AB(2)**). Proposed **section 245H** defines 'exploited' as 'if the person is in a condition of forced labour, sexual servitude or slavery in Australia'.

2.10 Proposed **subsection 245AC(1)** creates the offence where a person allows a non-citizen (the *worker*) to work in breach of a visa condition that restricts the work the worker may do in Australia. In order for the offence to be made out, the person must know, or be reckless as to whether the worker is:

- a non-citizen;
- subject to a visa restriction on the work that they may do in Australia; and
- in breach of the work conditions of their visa.

5 See Explanatory Memorandum, Part 5.

6 Explanatory Memorandum, paragraph 7.1.

2.11 The offence is an aggravated offence if the person knows, or is reckless as to whether, the worker is being exploited (**subsection 245AC(2)**).

2.12 Proposed **subsection 245AD(1)** makes it an offence for a person who operates a referral service to refer an unlawful non-citizen (the *prospective worker*) for work. The offence requires that at the time the person made the referral they know, or are reckless as to whether, the prospective worker is an unlawful non-citizen.

2.13 Proposed **subsection 245D(2)** provides that the offence is an aggravated offence if the person operating the referral service knows, or is reckless as to whether, the prospective worker will be exploited in the course of:

- the work for which they are referred; or
- any other work that they do for the person to whom they are referred.

2.14 Proposed **subsection 245E(1)** makes it an offence for a person operating a referral service to refer a non-citizen (the *prospective worker*) for work which is in breach of the prospective worker's visa conditions. The offence is made out if the person operating the referral service, at the time they made the referral, knows, or is reckless as to, the following:

- that the prospective worker is a non-citizen;
- that the prospective worker is subject to visa conditions restricting the work they may do in Australia; and
- that in doing the work for which the labour supplier refers the prospective worker, the prospective worker will be in breach of their visa conditions.

2.15 Proposed **subsection 245E(2)** provides that the offence is an aggravated offence if the person operating the referral service knows, or is reckless as to whether, the prospective worker will be exploited in the course of:

- the work for which they are referred; or
- any other work that they do for the person to whom they are referred.

2.16 The aggravated offences in proposed subsections 245AB, 245AC, 245AD and 245AE are punishable by 5 years imprisonment. Otherwise, the offences in proposed sections 245AB, 245AC, 245AD and 245AE are punishable by 2 years imprisonment. As provided in section 4B of the *Crimes Act 1914*, a court may impose a pecuniary penalty, instead of, or in addition to the term of imprisonment. For natural persons, the penalty would be \$33,000 for the aggravated offences, and otherwise \$13,200. For a body corporate, the penalty for an aggravated offence would be \$165,000, and otherwise \$66,000.

2.17 Proposed **section 245AF** sets out the circumstances in which the offences in Subdivision C do not apply. Those circumstances include:

- detainees in immigration detention who voluntarily engage in activity approved by the Secretary of the Department (paragraph **245AF(a)**); and

- prisoners in a prison or remand centre engaging in an activity as a prisoner (paragraph **245AF(b)**).

2.18 Proposed subsection **245AG(1)** defines 'work' as any work for reward or otherwise. The Explanatory Memorandum states:

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.⁷

2.19 Proposed subsection **245AG(2)** defines when a person 'allows' a second person to work as:

- where the second person is employed by the first person under a contract of service; or
- the first person engages the second person, other than in a domestic context, under a contract for services; or
- the first person bails or licences a chattel to the second person, or another person, with the intention that the second person will use the chattel to perform a transportation service; or
- the first person leases or licences premises, or a space within premises, to the second person, or another person, with the intention that the second person will use the premises or space to perform sexual services.

2.20 Proposed **subsection 245AK(3)** provides guidance to courts in making findings in relation to the new offences introduced by the Bill. In a trial for an aggravated offences in 245AB, 245AC, 245AD or 245AE, where the trier of fact is not satisfied that the defendant is guilty of the aggravated offence, but is satisfied that the defendant is guilty of an offence against 245AB, 245AC, 245AD or 245AE, then the trier of fact may find the defendant not guilty of an aggravated offence, but guilty of the offence.

2.21 The offences in the bill commence on a day to be fixed by Proclamation or, if this does not occur within six months of Royal Assent, on the first day after that period.⁸

7 Explanatory Memorandum, paragraph 94.

8 Clause 2.