Inquiry into the

"Migration Amendment (Employer Sanctions) Bill 2006"

Submission to the
Senate Legal and Constitutional Committee
of the Parliament of Australia

A submission by the members and National Executive of
The Migration Institute of Australia Limited
April 2006

THE MIGRATION INSTITUTE OF AUSTRALIA LIMITED ("MIA")

The Migration Institute of Australia Limited ("MIA") is the peak association providing excellent service advocating the benefits of migration and advancing the standing of the migration profession – leading professionalism in the migration field.

The MIA is the peak body representing the professional interests of its more than 1,500 (registered migration agent and corporate membership) members throughout Australia.

The MIA is perhaps better known to the Parliament for the exercise of its public responsibilities as the Migration Agents Registration Authority (MARA), under an Instrument of appointment by the Minister for Immigration & Multicultural Affairs.

This submission is written to the Parliament in MIA's representation role as the professional body, and in no way is the submission provided in MIA's capacity as the profession regulator.

This submission has been drafted by MIA members: Brendan Ryan, Daniel Engles, Brenda Smith, Karen Mathiesen, Maree Elliott, Ron Dick and Rob Jackson on behalf of the MIA.

Inquiries to: David Mawson
Chief Executive Officer
The Migration Institute of Australia Limited
PO Box Q102
QVB NSW 1230
ceo@miamail.org.au
(02) 92793140

Migration Amendment (Employer Sanctions) Bill 2006

The Migration Institute of Australia (MIA), which represents in excess of 1,440 registered migration agents in Australia, welcomes the opportunity to comment on the *Migration Amendment (Employer Sanctions) Bill 2006*.

It is an often-overlooked fact that the migration advice profession provides immigration advice and assistance to a vast range of Australian and multinational businesses, ranging from global corporations to small and medium business enterprises. The interests and concerns of this disparate group can often differ significantly given the different environments in which they operate. The MIA has tried in this submission to combine all of the issues related to this Bill that our members deal with on a regular basis.

Support for the Bill

Firstly, we state our support for the broad thrust of the *Migration Amendment (Employer Sanctions) Bill 2006*. The Institute believes that the introduction of penalties for individuals and bodies corporate who employ people without valid authority is a reasonable and appropriate action by the Government. We acknowledge the removal of the strict liability offence that was present in the earlier draft Bill.

Our comments are, therefore, focussed on suggestions to enhance the effectiveness of the legislation, with the exception of 5.245AD, where we do have a number of concerns.

Definition of the term 'reckless'

While we believe this legislation is well balanced and reasonable, we note that the penalties for business are harsh and represent a significant additional responsibility for officers of a company.

We are concerned, therefore, at the lack of clear definition in the draft Bill, particularly related to the term **'reckless'**. We note that the Explanatory Memorandum (paragraph 20), states that the penalty must be read with Sections 4AA and 4B of the *Crimes Act 1914*, and that at paragraph 21 it refers to the definition of 'reckless' contained in Subsection 5.4 (i) of the *Criminal Code*. However, we believe that this definition of the term 'reckless' is so central to the application of these penalties, that it should be included in the body of the *Migration Amendment (Employer Sanctions) Bill 2006*, or at the very least we **recommend** that the Explanatory Memorandum includes an expanded range of examples.

Definition of the term 'person'

We are concerned that there is no definition of the term **'person'** in the draft Bill. We believe it will be important to identify a specific class or group of people within an organisation who should bear responsibility. These provisions currently exist in other criminal law and we **recommend** the inclusion of some definition of person.

Onus on employers to check status

We recognise the efforts of the Department to raise awareness of employers' obligations in this regard and welcome the recommendation that the Employer Awareness Campaign and the EVO continue.

We also note the Department's comments at 7.2.4 of the Explanatory Memorandum that the Immigration Records Information System (IRIS) limits the amount of information that can be printed on a visa label.

However, we **recommend** the Department investigate the feasibility of including a reference to the EVO internet system on all temporary entry visa labels. Economical but plain language English reference could be along the lines of "Check employment rights at www.evo.gov.au".

In this way the Department will have encouraged active involvement by visa holders and employers alike in checking on work rights and, at the same time, reduced arguments that an employer had not acted 'recklessly' by failing to check on the visa status of an existing or prospective employee.

The MIA has long held the view that access by Registered Migration Agents to the DIMA EVO system would greatly assist both our clients and DIMA in more readily determining an individual's visa status. To date this request has not been actioned by the Department. We reiterate that our individual and company clients, as well as DIMA, will stand to benefit by providing RMA's with access. Any Privacy concerns for the individuals can be addressed as a mechanism of granting access, and should not be seen as an insurmountable barrier. We **recommend** the Department work with the MIA to progress this issue.

Further extension of Employer Awareness Campaign

We further **recommend** that the Department consider a leaflet campaign.

While considerable effort has been undertaken by the Department in raising awareness of employers, there are temporary visa holders who innocently breach work conditions on their visas either through a misunderstanding or language barrier.

We **recommend** the Department investigate the cost/benefit feasibility of embarking on a leaflet campaign for all people travelling to Australia. This leaflet could be a simple, multilingual small leaflet referring airline travellers to the Department's EVO website and other avenues to seek confirmation of work rights.

The brochure could refer those needing guidance, who do not speak English, to a multilingual telephone service or faxback service who will have access to appropriate interpreter services.

We recognise that distribution of this brochure could be time consuming at the immigration entry point at airports, and we suggest DIMA investigate whether distribution could take place on airplanes when the Passenger Arrival Card is distributed to travellers.

Additional inter-departmental cooperation

We note the extent of coordination with other Departments, but **recommend** that the Department provide increased training to the Workplace Inspectors employed by the Department of Workplace Relations. These officers may often be in a position to first identify possible breaches of the *Migration Amendment (Employer Sanctions) Bill 2006.*

Concerns with S245AD

We note the Department's aim of dealing with those individuals or agencies that refer potential illegal employees to organisations who subsequently employ those individuals, whether knowingly or inadvertently.

However, we are concerned that there is no definition of referral.

Using an example from our own profession, agents are often approached by individuals interested in obtaining work. Our engagement with business often means registered migration agents are aware of employers looking for suitably qualified employees. To illustrate this point, one scenario is where the agent was to refer someone on, say, a Working Holiday Visa to a potential employer with the request that they return for assistance with a 457 visa if they are successful in their application. If this individual, or the employer, did not return for assistance with the appropriate visa and they were subsequently found to be working illegally, would this constitute a referral?

Our greatest concern, however, is that the inclusion of referral as a potential offence runs the risk of actually diluting the Governments message and being counter-productive when seeking a prosecution.

We believe the most effective way of ensuring widespread compliance by business is to ensure there are clear lines of responsibility and accountability. By introducing referral as an offence it could lead to confusion as to which individual or organisation actually bears responsibility for employing a person illegally.

The MIA is of the view the most effective way of avoiding confusion, or a challenge to a prosecution on the grounds of diminished responsibility, is to make the status of <u>employer</u> the sole responsibility.

If a labour hire company employs an individual by placing them on their payroll and controlling their activities and they subsequently contract the employee's services out to other organisations, they have clearly assumed responsibility as the employer. That labour hire company is therefore subject to penalties if they employ a person illegally.

If, however, they refer an individual for potential employment, we believe it is imperative that the employer understands they have a responsibility to satisfy themselves regarding the visa status of the potential recruit. To do otherwise would lead to cases of split or shared responsibility, and at the very least complicate any prosecution.

It remains, of course, open to potential employers to contractually obligate labour hire companies or any other source of referral to conduct some pre-screening, but

responsibility must remain clearly with the employer to maintain the integrity of the penalty regime.

The MIA therefore **recommends** that the penalties associated with referring a person for employment contained in S245AD be removed from the draft Bill.

Broader Consultation

The MIA **strongly recommends** that DIMA consults with the two peak Recruitment industry bodies, being Recruitment and Consulting Services Association Ltd (RCSA) and the Information Technology Contract and Recruitment Association (ITCRA) to seek their views on this draft Bill, particularly in relation to S245AD. Given the penalties involved, we further **recommend** that the Australian Human Resources Institute, the Australian Institute of Management and the Law Council be consulted on the draft Bill.

Conclusion

The MIA has a keen interest in the proposed new Employers Sanction legislation. We are readily available to discuss or expand on the above comments and suggestions as appropriate and would be pleased to appear before this Senate Inquiry should we be invited to do so.

We would appreciate the opportunity to provide additional submissions to the Committee if further relevant information comes to notice.

The Migration Institute of Australia Limited
April 2006