CHAMBER OF COMMERCE AND INDUSTRY
WESTERN AUSTRALIA

BDW/LMH

18 April 2006

The Secretary
Senate, Legal and Constitutional Legislation Committee
Department of the Senate
P O Box 6100
Parliament House
CANBERRA ACT 2600

For the attention of Mr Jonathon Curtis

Dear Sir

Inquiry into the Migration Amendment (Employer Sanctions) Bill 2006

With reference to the above inquiry, the Chamber of Commerce and Industry of Western Australia makes the following submission.

Introduction

The Chamber of Commerce and Industry of WA (Inc) is Western Australia's largest business organisation with over 4,500 employer members. CCI is a non-profit organisation with membership open to businesses from any industry and of any size. CCI's members operate in industries as diverse as mining, building, health, hospitality, services, manufacturing, engineering, wholesale, retail and agriculture. CCI has extensive involvement on behalf of its members in workplace relations, occupational health and safety, workers compensation and education and training matters across these industries.

In light of the skilled labour shortage in Western Australia, CCI has for some time been offering to members' assistance to identify prospective skilled migrants. CCI's trade and migration staff have participated in skills expos organised by the Department of Immigration and Multicultural Affairs with the aim of identifying suitably skilled individuals from overseas including, tradespeople, engineers and health professionals. Independently of the Department CCI has also participated in other overseas expos, including Emigrate in England. CCI provides comprehensive migration services to members and we aim to provide streamlined and customised solutions to assist employers competing in the global labour market.

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CCI has also partnered with the Department to host an industry outreach officer who is currently on secondment to CCI for eighteen months.

The Employer Sanctions Bill

CCI has reviewed the *Migration Amendment (Employer Sanctions) Bill 2006* and has a number of concerns with its provisions.

Reckless?

Firstly, the Bill repeatedly uses a concept that a person commits an offence, if that person is "… reckless as to whether, the worker is an…" unlawful non-citizen or holds a visa that is subject to a condition restricting the work that individual may do in Australia.

This concept of having been "reckless" is included in the Bill at sections 245AB, 245AC and 245AE.

We are concerned that the concept of "reckless" involves a significantly lesser level of awareness by an employer of the true nature of a workers work status than the primary offence in the Bill, of having knowingly engaged such a person to work. We appreciate the difficulty where an employer adopts a policy of not asking, so as to avoid having knowledge of their workers status however the low awareness threshold for an offence to have been committed by an employer judged to have been reckless exposes employers to large penalties and is in our view unreasonable.

The penalties in the Bill are imprisonment for up to two years or as the Explanatory Memorandum indicates at paragraph 20 instead of imprisonment the Crimes Act of 1914 provides for a pecuniary penalty instead not exceeding $13,200 for an individual and $66,000 for a body corporate.

The Explanatory Memorandum at paragraph 22 explains that to prove an employer was "reckless" it would be required for the prosecution to establish that:

- there was a substantial risk the worker was an unlawful non-citizen;
- the employer was aware of this substantial risk; and
- having regard to the circumstances known to the employer, it was unjustifiable for the employer to have taken the risk

The Explanatory Memorandum goes on to say that the fault element of "recklessness" is a variable standard which is flexible having regard to a range of offences covered by the criminal code and that the Attorney General Department's guide for practitioners notes that a substantial risk varies from "likely or probably" to the lesser requirement that it be "merely possible".

Our concerns are highlighted by paragraph 25 of the Explanatory Memorandum which reads,

"it is intended that a person would be reckless as to the circumstances in paragraph 245AB(1)(b) where he/she is aware of the possibility that a worker could be an unlawful non-citizen."

The Explanatory Memorandum goes on to say that "the possibility of a worker being an unlawful non-citizen exists in all industries but is more likely in those industries where the Department locates a relatively high proportion of illegal workers such as in the construction, taxi, hospitality, cleaning, horticultural and sex industries".

It seems then that there is a possibility that any worker could be an unlawful non-citizen or working contrary to the conditions of their visa. Should it transpire that such a worker was indeed an unlawful non-citizen or working contrary to their visa, then the first element of an offence has been satisfied – there was a substantial risk because this applies to all workers. As a consequence because of the very broad application of these provisions, virtually all employers regardless of their industry will need to guard against something which is "…merely possible…".

In CCI's submission this concept of "reckless" is too broad and if allowed to stand many employers will potentially be exposed to breaches of this legislation well beyond the intent of the Bill.

Work?

A separate concern we wish to raise involves the definition of "work" in section 245AG.

This section says that work means "… any work, whether for reward or otherwise".

The Explanatory Memorandum at paragraph 94 states that this broad definition is intended to include "...paid work, voluntary work or work done in return for accommodation, food or any other benefit".

In CCI's submission this approach, particularly including voluntary work, is also far too broad and is at odds with the second reading speech that identifies the key aim of this Bill is to ensure that Australian workers are not displaced from jobs by non-citizens or visitors working contrary to their visa conditions.

The concern is that visitors to Australia innocently engaged in voluntary work for charities or community groups e.g. a Keeping Australia Beautiful roadside clean-up or environmental volunteer work would on the face of this Bill expose the organisers of such events to prosecution.

This unintended consequence could be avoided by a having broader set of exclusions than those included in the Bill. The current exclusions, under section 245AF, seem to only deal with work required by the State or Commonwealth Governments.

Independent Contractors

The final concern we wish to raise concerns the provisions dealing with work as independent contractors.

Section 245AG at (2)(b) includes within the definition of work situations where "…the first person engages the second person, other than in a domestic context, under a contract for services;".

This is a common situation, where a business will engage an independent contractor to carry out services for them ranging from ad hoc minor maintenance, eg emergency plumbing or glazing through to an ongoing relationship between a principal and contractor to outsource non-core elements of the principals activities.

Our reading of the legislation is in all such circumstances the principal is subject to the legislation and if it transpires that the independent contractor is a non-citizen or a person working contrary to conditions in their visa the principal is exposed to prosecution if it can be demonstrated that they have been "reckless". This approach as we have explained above involves a threshold of very limited awareness and is far too broad in our view.

Again the intention of the Bill in the Explanatory Memorandum is to ensure that some interactions that are not strictly employment are caught by the legislation and we do appreciate the need to address such contracting arrangements, however in CCI's submission this legislation should not inadvertently be regulating business-to-business relationships in general.

It is particularly problematic for a principal to assess whether or not a person, who is an independent contractor, has appropriate status to work in Australia. Again in our view this area of the Bill casts its net too wide and creates unwarranted risks for business and industry at large when involved in every day contracting.

We would ask the Senate Committee to consider the concerns we have raised in this submission in the interests of ensuring that this legislation does not impose on unwitting employers unreasonable burdens and expose such employers to significant penalties well beyond the intent of the legislation.

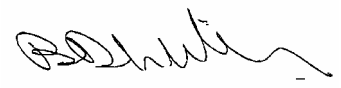
Other Measures?

A central element of the Governments strategy to curb employment of unlawful non-citizens and work in breach of visa conditions is access by employers to the Departments entitlements verification service ("EVO"). This service is currently available to employers, labour providers and visa holders. The EVO provides access via the internet to information that confirms a non-citizens entitlement to work. One administrative action the Department could make to support the aims of this Bill would be to extend access to the EVO to employer organisation such as CCI. This in CCI's instance would allow us to verify the work entitlements of visa holders on behalf of our members.

This change would make the EVO more accessible to those employers who are the focus of this Bill.

Should you have any inquiries regarding the concerns we have raised in this submission we would be happy to discuss these matters with you.

Yours sincerely



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