AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Inquiry into the Migration Amendment (Employer Sanctions) Bill 2006

ACCI Submission to the Senate Legal and Constitutional Committee

April 2006

LEADING AUSTRALIAN BUSINESS

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ABOUT ACCI

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufacturers of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

SUMMARY

The proposed amendment would amend the *Migration Act 1958* to introduce new offences for employers, labour suppliers and other persons who allow non-citizens to work in Australia illegally.

When such legislation was first proposed, in 1999, the Australian Chamber of Commerce and Industry (ACCI), Australia's largest and most representative business organisation, made a submission to the then Minister for Immigration, opposing sanctions. The basis of the opposition at the time was the additional burden which the checks would impose on Australian employers.

Since that time, DIMA has streamlined some of the processes of checking work rights by establishing online, phone and fax facilities.

ACCI does not oppose the suggestion that, as best practice, employees' entitlements should be verified either prior to or early in their employment. In order to protect the interests of Australian workers, and to protect society from the other negative consequences associated with illegal workers, such as people trafficking, ACCI supports the need for legislation to ensure entitlements are verified, subject to the concerns listed below. However, it should be noted that there is already other legislation in place which penalises people trafficking, slavery and sexual servitude.

ACCI's concerns with the legislation as currently drafted fall into three main areas:

- The low threshold for breaching the "reckless" criterion
- The inclusion of workers outside a strict "employer-employee" relationship
- The burden of compliance, particularly for employers in industries deemed "at risk" who would need to check all potential employees, and the need for improved Government information and support for these businesses.

COMMENT

Reckless

ACCI does not support the current wording of the legislation, which provides for an offence to occur where an employer "knowingly **or** recklessly" employs an illegal worker.

ACCI is concerned that the concept of "reckless" involves a significantly lesser level of awareness by an employer of the true nature of a worker's work status than the primary offence in the Bill, of having knowingly engaged such a person to work. While employers may seek to avoid the "knowingly" criterion by not checking employees' work rights, the low awareness threshold for an employer to be judged to have been reckless exposes employers to large penalties and is in our view unreasonable.

Our concern is 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."

In order to avoid breaching this legislation, employers will be placed in a situation of having to make a value

judgement about whether a prospective employee is at risk of being an illegal worker. The subjective nature of this assessment could leave employers open to prosecution under anti-discrimination legislation.

In ACCI's submission this concept of "reckless" is too broad and as a consequence many employers will potentially be exposed to breaches of this legislation well beyond the intent of the Bill.

These provisions place the onus of verifying a worker's legal status on the employer. ACCI believes that it is inappropriate for employers to be required to undertake this role. Employers should not be subjected to such a risk when engaging workers.

Alternative wording, such as to omit the word "recklessly" entirely, or to penalise employers who "knowingly **and** recklessly" employ illegal workers, would be more acceptable.

Work

A separate concern we wish to raise regarding the legislation is the definition of "work" contained in section 245AG.

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

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;".

Our reading of the legislation is that this provision would only apply to the business which engages or contracts an overseas worker who is not lawfully able to work. We understand it would not apply to a principal who engaged a contractor who in turn used a sub-contractor who engaged a non-citizen or a person working contrary to conditions in their visa. (For example, where Entity A contracted Entity B to provide a service, and Entity B sub-contracted Entity C, Entity B would be liable if Entity C were found to be an illegal worker, but Entity A would not be liable.)

ACCI's concern is that in a sub-contracting arrangement, the principal would be 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. However, if the provision relating to "knowingly or recklessly" is revised as suggested earlier, this concern would be of less relevance.

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.

Compliance Burden

ACCI notes that this requirement will impose additional workload on employers, and may be particularly onerous for those in industries with traditionally little formal paperwork around hiring practices.

The amount of time per worker required to verify their immigration status may only amount to a few minutes, but this could build up to a significant amount for businesses that employ large numbers of workers, and with high turnover rates (eg in the fruit-picking industry). This time needs to be balanced against the potential loss in productivity that could be experienced if illegal employees were removed from the workplace because of breaches of immigration laws.

All Australian businesses already have legal obligations towards all their employees, for wages and conditions of employment, as well as reporting for taxation and other purposes. In addition, businesses which have sponsored overseas workers have obligations towards them and towards the Australian Government. This new requirement on employers would seem to contravene both the recent review of the Regulation Taskforce and the direction of the February COAG meeting, both of which sought to reduce the level of regulatory burden on business.

A possible alternative would be to place the onus on prospective employees to provide evidence of their immigration or work status.

Information and Support from Government

ACCI members find the cumulative effect of existing obligations to be cumbersome and confusing.

One significant element from employers' perspective of these additional proposed obligations is that they make the need for information about employers' rights and responsibilities even more pressing.

ACCI has been discussing these requirements with the Department of Immigration and Multicultural Affairs for some time. ACCI believes that employer obligations need to be simplified, and clearly explained, and will continue to meet with and lobby the Department for better support to meet employers' needs.

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