New employer sanctions under the Migration Act

By JOANNE KINSLOR

Practitioners need to be aware changes to the Migration Act 1958 will mean employers may risk civil penalties for failure to ensure employees have correct work visas.

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The *Migration Amendment (Reform of Employer Sanctions) Act 2013* seeks to ensure that foreign workers are only employed in accordance with immigration requirements. It has received royal assent and will commence upon proclamation or in September 2013. The amending Act amends the *Migration Act 1958* to introduce new non-fault civil penalties for employers, adjust existing criminal offences for employers, expand liability of executive officers involved in employing illegal workers and provide new investigative powers to the Department of Immigration and Citizenship.

As a result of the amendments to the Act, Australian employers will now bear the risk of sanctions unless they are proactive in checking the immigration status and work rights of all workers.

The practical risk of sanctions for employers will be influenced by the approach taken by regulators, and the government has stated that warning notices will be given as a first step.[1] Nevertheless, it is evident that the amending Act seeks to effect a cultural change in co-opting all Australian employers in the regulation of foreign workers.

Background

Facilitated by its natural borders, Australia operates a highly controlled immigration regime in which the participation of foreign nationals in the workforce is tightly managed.[2]

The immigration laws (in terms of workforce participation) are concerned with economic benefits for Australia, protecting job opportunities and conditions for Australian workers (including non-citizens with permanent resident status), as well as protecting foreign nationals from exploitation and ensuring social cohesion.

Within this context Australia's small number of illegal workers (estimated to be less than 1 per cent of the Australian workforce)[3] present a difficulty that the amending Act seeks to address. The Howells Report[4] which precipitated the amending Act found the previous sanction regime wholly ineffective against employers deliberately employing illegal workers. Howells described the "principal reason" for the failure of the sanction regime as being "that the 'best evidence' of breach would almost always come from the workers themselves but their evidence is affected by their complicity or independent culpability" in working without permission.[5]

Illegal workers in this context refers to foreign nationals without any visa permission to reside in Australia (referred to as unlawful non-citizens), as well as those working in contravention of the conditions on their visa. Visa work conditions vary and can include no work, work for a limited number of hours and work limited to a particular role and employer.

There is no typical illegal worker. About a quarter of unlawful non-citizens who have remained in Australia past the expiry of their visas (referred to as 'overstayers') have been in Australia for 15 years or more.[6] The largest groups of over-stayers are US and British nationals.[7] Nationals from South East Asia make up a high proportion of those working in Australia with a visa but contrary to the conditions on the visa.[8]

The amending Act expands the power of regulators to sanction employers employing illegal workers by introducing new civil penalties, amending criminal offences, making executive officers liable for the conduct of corporate bodies and introducing new investigative powers.

While these additional powers have been justified as necessary to deal with the small number of employers who have demonstrated contempt for the law and its enforcers,[9] the amending Act has implications for all employers because it creates risk of sanction for all Australian employers who do not check and monitor the work permission of employees.

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The new civil penalty regime

An employer who allows a foreign national to work without immigration permission is liable for a civil penalty of 90 units.[10]

Work is defined broadly and has been extended to cover "any arrangement included in a series of arrangements"[11] for the performance of work of a person. An employer is only liable for employment in breach of visa conditions if the breach arose solely from that work.

The new civil penalties regime is a non fault one in that the offence is established regardless of the state of mind of the employer. There is no distinction between an employer innocently allowing a person to work without permission or knowingly acting in disregard of the law. However, the civil penalty can be avoided if the employer has taken "reasonable steps at reasonable times to verify that" the worker holds a valid visa and works in compliance with the conditions on the visa.

The Explanatory Memorandum to the amending Act describes an intention that "reasonable steps" include using the Department of Immigration and Citizenship's Visa Entitlement Verification Online (VEVO) service *(tinyurl.com/yc5pjeu)* prior to, or within a few days of, an employee commencing employment.

The VEVO service requires employers to enter an employee's passport details to check their immigration status and work conditions. Limitations with the system include that some work permissions are verified for only a three-month period, despite being ongoing, and that Australian citizens and some permanent residents are not included in the system. This means the system can fail to distinguish between an Australian citizen and a foreign national without a visa. In such a situation the expectation is that a potential employee would be required to provide evidence of their Australian citizenship or status as a permanent resident, such as an Australian passport, birth certificate or residence label.

An employer bears the evidential burden of establishing that "reasonable steps" have been taken within a "reasonable time".

If the employer can establish (on the balance of probabilities) that they held a mistaken, but reasonable belief that an employee was entitled to work

the employer is not liable for a civil penalty.[12] Such a situation could potentially arise where an employee provided fraudulent documents to an employer.

Criminal offences

An employer who knowingly or recklessly employs a foreign national to work illegally commits a criminal offence punishable by two years imprisonment.[13]

The offence becomes an aggravated offence if the employer knows, or is reckless to the fact that the illegal worker is being exploited. That offence is punishable by five years imprisonment.[14] Exploitation refers to conduct that causes a person to enter into slavery or a condition similar to slavery, servitude, forced labour, forced marriage or debt bondage.

If a person is convicted of a criminal offence the conduct giving rise to the offence cannot also give rise to a civil penalty.[15]

Illegally referring another for work

Civil and criminal offences also apply where a person who "operates a service, whether for reward or otherwise, referring other persons" for work refers a foreign national without a work visa or refers a foreign national to work in contravention of the conditions on their visa.[16] Aggravated offences apply where the referrer knows or is reckless about the fact that the worker will be exploited working for the employer to which they are referred.[17]

New liability for executive officers

The amending Act increases liability for executive officers of corporate bodies (including directors, chief executive officers, chief financial officers and secretaries) with new civil penalties and criminal offences. In circumstances where a body corporate commits a civil contravention or criminal offence described above and the officer was: ☐ "reckless or negligent" about whether the contravention/offence would occur; ☐ in a "position to influence" whether it would occur; and ☐ failed to take reasonable steps to prevent the occurrence, the officer will be personally liable.[18]

In determining whether the officer acted reasonably, a court must consider steps taken by the officer to ensure that employees, agents and contractors of the body corporate understood immigration work requirements.[19]

New investigative powers

The amending Act provides investigative powers for the Department Secretary to require employers to provide documents or information about possible contraventions and offences.[20]

It also empowers judicial officers to issue search warrants to search premises, operate electronic equipment and download material, seize evidence and ask questions. ☐

ENDNOTES

1. Former Minister for Immigration and Citizenship C. Bowen MP, Migration Amendment (Reform of Employer Sanctions) Bill 2012. Second reading speech, House of Representatives.
2. The 457 visa scheme is an example of such regulation. Within this scheme foreign workers are strictly limited in terms of the work they can undertake and employers must comply with ongoing sponsorship obligations and reporting requirements.
3. S.Howells. "Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007*", Commonwealth of Australia (2011), p.25.
4. Ibid.
5. Ibid at p.14.
6. Ibid at p.100.
7. Ibid at p.28.
8. Ibid at p.66.
9. Ibid and at n.1.
10. *Migration Act 1958* s. 245AB and s.245AC. Ninety penalty units is currently $15,300 for an individual. If the employer is a body corporate the penalty may be five times that amount. Refer s. 486R(5)(a).
11. Ibid, s.245AG(2)(b) and s.245AG(2)(ba).
12. Ibid, s.486ZE.
13. Ibid, s.245AB and s.245AC.
14. Ibid, s.245AD and s.245AE.
15. Ibid, s.486Z.
16. Ibid, s.245AE and s.245EA.
17. Ibid, s.245EB.
18. Ibid, s.245AJ and s.245AK. The right against self-incrimination has been abrogated in relation to these powers. However, the information or document(s) obtained may only be used for limited purposes. Refer s.487C *Migration Act 1958*.
19. Ibid, s.245AJ(3) and s.245AK(3).
20. Ibid, s.487B.
21. Ibid, s.487D. ☐