RISK AND COMPLEXITY OF THE EMPLOYER SANCTIONS LEGISLATION: A HUMAN RESOURCE MANAGEMENT NIGHTMARE[1]

As part of a campaign to suppress the number of illegal immigrants and people with lawful visas holding limited or no rights to work - such as students and holders of business short stay visas - being employed in Australia, the legislature enacted the *Migration Amendment (Employer Sanctions) Act* 2007 which amended the *Migration Act* 1958 (Cth). It is designed to make employers criminally liable for hiring illegal workers in Australia. These provisions were initially introduced in 2007 and subsequently amended in 2013 in accordance with the Migration Amendment (Reform of Employer Sanctions) Act 2013. According to the Explanatory Memorandum when the bill[2] was introduced into Parliament in response to the 'Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007', the purpose was to:

- amend the criminal offences and create new non-fault civil penalty provisions and an infringement notice scheme for people who allow or refer an unlawful non-citizen to work, or allow or refer a lawful non-citizen to work in breach of a work-related visa condition
- create statutory defences where reasonable steps are taken at reasonable times to verify a foreign national worker's entitlement to work

[1] This article is substantially adapted from an article in Law Institute Journal, May 2008, Migration Confusion: A Risky Business and has been updated by the Migration Team at FCG Legal Pty Ltd.

[2] *Migration Amendment (Reform of Employer Sanctions) Bill* 2012.

- broaden the application of criminal offences and civil penalty provisions to hold a person liable for participating in an arrangement, or series of arrangements, that results in a foreign national working without lawful entitlement
- extend both criminal and civil liability, in certain circumstances, to executive officers of bodies corporate, partners in a partnership and members of an unincorporated association's committee of management
- create search warrant and notice to produce powers specifically to facilitate the investigation of suspected breaches of these offences and civil penalties.[3]

Some Australian industries are still experiencing a significant shortage of skilled workers. The need for employers to find "employees" (whether as contractors or employees) in tight labour market conditions places them in a difficult position. The utilisation of temporary residents to fill the void has become more acute.

The migration industry operates under a highly prescriptive regulatory regime and the complex manner in which Schedule 8 of the *Migration Regulations* 1994 (Cth) regulates visa conditions will almost certainly lead to confusion for many employers attempting to decipher visa grant notices and applicable visa conditions.[4] While the cessation of the use of visa labels in 2015 has led to a

[3] Refer to explanatory memorandum

[4] See for example condition 8112 which stipulates that "the holder must not engage in work in Australia that might otherwise be carried out by an Australian citizen or an Australian permanent resident."

greater reliance on visa grant notices and the Visa Entitlement Verification Online (VEVO) system, both of which more clearly detail the applicable visa conditions than visa labels were able to, the extensive number of work-related visa conditions still presents the possibility for confusion, misunderstanding and misinterpretation by employers and employees alike.

It is clear that the introduction of criminal sanctions in this area will expose employers, whether they be individual or corporate, to considerable risk.

Factual Scenario

Imagine a situation where you have just hired an executive for your company who is on a temporary spouse visa (subclass 820 – in immigration law parlance). The contract of employment is drawn, the company policy manual is supplied and you obtain a copy of the visa. You discover that there are no restrictions in terms of the capacity to work and the person continues to work for the company in a harmonious manner. About 6 months later, unknown to you, the visa of the employee is cancelled in light of the fact that the employee is no longer in a spousal relationship with the Australian resident or citizen but has continued to work with the company after the cancellation. The employee has not informed you and has not regularised their status by obtaining a Bridging E visa, meaning that they are currently unlawful. The personnel file reveals that you checked the visa conditions once when the person was employed initially and have not monitored visa status in the meantime. It could be alleged that the failure to

monitor amounted to recklessness and that the company committed an offence under sub-s 245AB(1) of the Act.

The employer sanction provisions in summary provide as follows:

The relevant provisions[5]

Allowing an unlawful non-citizen to work		
Section	**Offence**	**Penalty**
Sub-s 245AB(1)	Creates an offence if a person allows, or continues to allow, a worker to work when the worker is an unlawful non-citizen. Sub-s 245AB(4) requires that the employer had knowledge of, or was reckless of the fact.	The penalty is 2 years imprisonment **(sub-s 245AB(3))** or 90 penalty units **(sub-s 245AB(5))**
Allowing a non-citizen to work who is in breach of a work-related visa condition		
Section	**Offence**	**Penalty**
Sub-s 245AC(1)	Creates an offence for an employer who employs, or continues to employ, a person when the person is a non-citizen whose visa is subject to a work-related condition, which they are breaching because of this work. Sub-s 245AC(4) requires that the employer had knowledge of, or was reckless of the fact.	The penalties are the same as for **s 245AB**.

[5] *Migration Act* 1958 (Cth), ss 245AB – s245AH.

Aggravated offences for allowing, or continuing to allow, a person to work who is an unlawful non-citizen or who does not have work rights		
Section	**Offence**	**Penalty**
Sub-s 245AD(1)	Creates an offence for an employer who employs, or continues to employ, a person, knowing or being reckless about the fact that the person is an unlawful non-citizen and is being exploited. This is an aggravated offence of the offence in sub-s 245AB(1).	The penalty is a maximum of 5 years imprisonment (**paragraph 245AD(1)**).
Sub-s 245AD(2)	Creates an offence for an employer who employs, or continues to employ, a person, knowing or being reckless about the fact that the person is a non-citizen whose visa is subject to a work-related condition, which is being breached as a result of their work, and who is being exploited. This is an aggravated offence of the offence in sub-s 245AC(1).	Punishable by a maximum penalty of 5 years imprisonment (**paragraph 245AD(2)**).
Referring an unlawful non-citizen for work		
Section	**Offence**	**Penalty**
Sub-s 245AE(1)	Creates an offence for a labour supplier to refer a prospective worker to a third person for work, when the worker is an unlawful non-citizen. Sub-s 245AE(4) requires that the labour supplier had knowledge, or was reckless, of the fact.	The penalty is a maximum of 2 years imprisonment (**paragraph 245AE(3)** or 90 penalty units **(paragraph 245AE(5)**).
Referring a non-citizen for work in breach of a work-related visa condition		
Section	**Offence**	**Penalty**
Sub-s 245AEA(1)	Creates an offence for a labour supplier to refer a prospective worker to a third person for work, when the worker is a	The maximum penalty is imprisonment for 2 years **(paragraph 245AEA(3))** or 90

	non-citizen who has a work-related condition on their visa and will be in breach of the work conditions by undertaking this work. Sub-s 245AEA(4) requires that the labour supplier had knowledge, or was reckless, of the fact.	penalty units **(paragraph 245AEA(5)).**
Aggravated offences for referring a person for work who is an unlawful non-citizen or who does not have work rights		
Section	**Offence**	**Penalty**
Sub-s 245AEB(1)	Creates an offence for a labour supplier who refers a person to a third person for work, knowing or being reckless about the fact that the person is an unlawful non-citizen and will be exploited. This is an aggravated offence of the offence in sub-s 245AE(1).	The penalty is a maximum of 5 years imprisonment (**paragraph 245AEB(1)**).
Sub-s 245AEB (2)	Creates an offence for a labour supplier who refers a person to a third person for work, knowing or being reckless about the fact that the person is a non-citizen whose visa is subject to a work-related condition, which will be breached by doing the work, and who will be exploited. This is an aggravated offence of the offence in sub-s 245AEA(1).	Punishable by a maximum penalty of 5 years imprisonment (**paragraph 245EB(2)**).

In summary, aggravated offences require the added element of exploitation. Section 245AH provides that exploitation has the same meaning as in section 271.1A of the Criminal Code, which provides that exploitation involves slavery (or a condition similar to slavery), servitude, forced labour, forced marriage or debt bondage.

Section 245AG provides relevant definitions for the provisions outlined above. ‘Work’ is defined in sub-s 245AG(1) as ‘any work, whether for reward or otherwise’. Allowing a person to work broadly requires a contract of service, an arrangement for the performance of work, bailing or licensing a chattel to be used for a transportation service, or leasing or licensing premises for the purpose of providing sexual services (sub-s 245AG(2)).

With the exception of the aggravated offences, these offences contain an exception if the employer or labour supplier has taken reasonable steps at reasonable times to use the Visa Entitlement Verification Online (VEVO) service to verify the worker’s status and any applicable visa conditions (sub-s 245AB(2) and reg 5.19G(1); sub-s 245AC(2) and reg 5.19H(1); sub-s 245AE(2) and reg 5.19J(1); and sub-s 245AEA(2) and reg 5.19K(1)). There is also an exception if the employer or labour supplier has taken reasonable steps at reasonable times by entering into a contract whereby a person under that contract is engaged to verify the worker’s immigration status and any applicable visa conditions, or by inspecting evidence of the person’s status in Australia, such as by way of a passport, citizenship certificate or Australian birth certificate (sub-s 245AB(2) and reg 5.19G(2); sub-s 245AC(2) and reg 5.19H(2); sub-s 245AE(2) and reg 5.19J(2); and sub-s 245AEA(2) and reg 5.19K(2)). This highlights the importance of employers and labour suppliers being proactive in initially, and regularly thereafter, taking steps to ascertain or confirm the worker’s immigration status and whether there are any applicable visa conditions.

Conclusion

The legislation highlights the need for employer vigilance not only in ensuring appropriate visa status of new employees but also of ongoing employees whose visa status may well have changed after initial engagement.

The adoption by the legislature of the concept of recklessness throughout the Act imposes significant obligations on employers to take protective measures. For example, an employer who does not implement an ongoing employee visa monitoring system takes a very real risk that a Court would find recklessness and, therefore, guilt of a serious criminal offence, if an employee is discovered to be working in breach of visa conditions or does not have a visa. Migration agents can assist in this respect.

There is considerable concern that employers may be liable to civil as well as criminal sanctions where it is clear that the convoluted nature of the *Regulations* may lead them to make mistakes. This is despite the fact that the legislature has created a system to enable employers to ascertain specific visa conditions via the VEVO service on the internet[6] or a telephone call. Even more troubling is the situation for employers who already have a significant compliance burden in other areas such as taxation, employment law, work cover and superannuation obligations.

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[6] See website: https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online.