

Review of Employer Sanctions Legislation – Combating Illegal Work in Australia

Australian Workers' Union

Submission

June 2010

Executive Summary

The Australian Workers' Union (AWU) welcomes and supports the review of employer sanctions legislation - combating illegal work in Australia.

The review is a timely opportunity to assess the efficacy of current penalties facing Australian employers who recruit illegal workers. The aim should be to deny any legitimacy for this illicit employment practice resulting from the past poor record of enforcement under the Howard Government.

The AWU notes the Rudd Government has had success in locating illegal workers but there has been little progress in penalising employers and labour hire intermediaries who use them.

Strengthening the Employer Sanctions Legislation will allow the Department of Immigration and Citizenship (DIAC) and the government to enforce the legislation and prosecute employers who are found to be employing illegal labour.

These practices are far from benign in nature for the illegal workers concerned and to the mainstream workforce generally. The AWU is concerned about the corrosive effect of illegal labour undermining legitimate employment arrangements, employee entitlements, and wages.

The AWU is also concerned to see coverage extend over the chain of responsibility - similar to amendments to Road Safety Legislation dealing with sub-contracting arrangements. The burden of liability should not solely rest with the sub contractor, but that responsibility for employing illegal labour should also rest with the principal employer.

The AWU is keen to participate in this review as the AWU represents workers in the agricultural sector who are most at risk from the impact of employers' resort to illegal workers. But other sectors, including manufacturing are also at risk and the AWU has examples of recent cases it would be happy to share with the review.

Better enforcement alongside improved awareness of alternative options means employers have greater incentives for participating in the formal routes for accessing labour rather than resorting to the informal / illegal ones.

The AWU congratulates the Minister for undertaking this review, on the appointment of Stephen Howells to oversee it and looks forward to participating in its deliberations.

Introduction

This submission concerns the recent announcement by the Minister for Immigration and Citizenship, Senator Chris Evans on the review of employer sanctions legislation – combating illegal work in Australia.¹

The purpose is to review the government's current legislative framework to prevent and prosecute employers for employing illegal workers.

While the purpose of the review is therefore not designed to examine the working conditions, pay and entitlements afforded to illegal workers, the AWU believes that a focus on these factors will also assist to more clearly demonstrate the costs to both these workers and to the mainstream workforce in Australia.

The AWU represents members, in particular in agriculture and manufacturing who have a major stake in the effective enforcement of laws aimed at preventing illegal work in Australia. This submission addresses a number of these key concerns.

The review

Illegal workers are defined in the *Migration Act* as either non-citizens who do not hold a visa and undertake work in Australia, or visa holders who work in breach of a visa condition, which prohibits or limits the work they can do.

As at 30 June 2009, it was estimated that some 48 700 people were unlawfully in Australia.

Around 80 per cent of these people are of working age. In addition, some people who are lawfully in Australia are working in breach of their visa conditions.

Latest figures reveal immigration compliance officers have detained 1271 illegal workers across a range of industries in the nine months to 31 March 2010.²

¹ Illegal hire firms must face prosecution, Senator Chris Evans, Minister for Immigration and Citizenship, 21 May 2010

² As above

Top industries for illegal workers³

Industry	Illegal workers located
Agriculture, forestry and fishing	494
Construction	208
Accommodation, cafes and restaurants	162
Retail trade	73
Industries not included above	334
Total	1271

DIAC has stepped up activity in various industries to ensure illegal workers are detained.

The AWU agrees with the Minister's comments that while most Australian employers do the right thing, there is emerging evidence that some are using illegal workers in an organised and criminal way. The AWU welcomes the fact that such behaviour will not be tolerated by this government.

The AWU agrees that there are deficiencies in the employer sanctions legislation, introduced by the Howard government, which needed to be addressed. The failure of the Howard government's legislation to effectively penalise employers who do the wrong thing by employing illegal workers undermines integrity and disadvantages those who are entitled to work in Australia.

The AWU notes that Senator Evans said the review would specifically look at toughening current penalties and the reason for lack of prosecutions of employers who did the wrong thing. And as we have already noted above, the plight of illegal workers themselves should not be forgotten because of the pernicious effects on the workers concerned and on the mainstream workforce.

The AWU therefore welcomes the appointment of independent legal expert Stephen Howells to provide options for giving the legislation more teeth and strengthening the suite of penalties available.

³ Immigration compliance – at a glance (2009-10 as at 31 March 2010), DIAC

The Howells' review will examine:

- the effectiveness of the legislative offences and current penalties;
- the effectiveness of current systems and operations to assist employers to comply with their obligations;
- the effect of the employer sanctions provisions on business; and
- the level of community understanding and acceptance of the need for an employer sanctions regime.

Illegal Work and the AWU

Illegal work has been seen as a problem in the Australian community for a number of reasonsⁱ however there are particular reasons why illegal work is of concern for the AWU, including:

- a) Illegal work undermines wage security, work safety and award/agreement compliance;
- b) The largest industry employer of illegal workers is the agricultural industry;
- c) Businesses that engage illegal workers are less likely to comply with legislative, award or agreement standards;
- d) The employment of illegal workers is unregulated and clandestine making it difficult for unions to identify and access potential members; and
- e) Illegal work often involves some form of exploitation of vulnerable people and may extend the more serious circumstance of forced labour.

The AWU agrees with the Minister that while elements of illegal work are opportunistic in nature, there is growing evidence pointing to a high level of organisation involving:

- labour hire intermediaries
- immigration agents
- offshore agents
- taxation evasion.

In response to this, the AWU welcomes that the Department is stepping up its efforts to respond to serious non-compliance within the agriculture sector in targeting the organisers of illegal labour hire rackets.

Current Legislation

Under the current legislation, an employer commits an offence if he or she knowingly or recklessly allows or refers an illegal worker to perform work (sections 245AB-245AE of the *Migration Act*). However, an employer may only be considered reckless if there was a substantial risk that the employee was an illegal worker.

The Review of Illegal Workers in Australia (RIWA) published by the Department of Immigration and Multicultural Affairs (DIMA) in 1999 recommended strict liability offences however these were not implemented by the Howard Government.

In addition to its compliance and enforcement work, DIAC provides a range of servicesⁱⁱ to assist employers comply with their legal obligations including the Visa Entitlement Verification Online (VEVO) service, which is a free online facility to check the visa entitlements of a visa holder. There is also a toll-free Faxback Service to work entitlements. To this end, employers have available sufficient and adequate support to ensure they only employ individuals with work entitlements.

Issues and Questions

Areas that the AWU has a major interest in the review addressing include:

- a) Understand the extent of abuse and apply strict liability as a deterrence to resorting to illegal workers in preference to legal options;
- b) Expose the linkage between illegal work in the informal economy, undermining the sustainability of legal options in the formal economy appropriately protected by law, typical of a black-market economy;
- c) Promote avenues for employers to access additional workers legitimately such as via the Pacific Seasonal Worker Pilot Scheme administered by DEEWR; and
- d) Assess the impact that illegal work has on the employment market in aggregate, including on the formal workforce's pay and conditions on the one hand and the public confidence in Australia's immigration program on the other.

Recommendations

Areas that the AWU supports the review making recommendations include:

- a) Inclusion of strict liability offences like those envisaged in the 1999 RIWA report to create a more effective graduated scale of penalties for employers;
- b) The addition of a civil penalty regime to create more effective deterrence;
- c) Oppose any incentives or concessions being introduced to encourage employer compliance which serve to undermine current (legal) working conditions and entitlements; and
- d) Increase chain of responsibility so that principal employers as the end users of labour are prosecuted for illegal work not just third party employers such as labour hire companies etc.

Conclusion

Obligations on employers to comply with employment and labour laws are clear cut. However, lack of enforcement has in recent years seen the emergence of an underclass of illegal workers operating in an informal economy in Australia.

It does a disservice to both illegal workers and to the wages and conditions of mainstream employees to tolerate circumstances where individuals are being exploited by unscrupulous entities aiming to profit from supplying cheap labour outside the normal market and legal constraints of the formal economy.

The AWU is a strong advocate for following the chain of responsibility such that the key actors involved in the illicit worker trade are caught and punished.

The AWU welcomes the opportunity to make this brief submission and stands ready to assist the review in coming weeks.

Endnotes

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- Deny Australian citizens and permanent residents the opportunity to obtain a job.
- Place an additional burden on the taxpayer in terms of costs associated with locating and removing illegal workers, uncollected taxes and fraudulently claimed government benefits.
- Disadvantage employers who employ legal workers because they may not be able to compete with those who employ and under-pay illegal workers.
- May be subject to exploitation and organised criminal activity.

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- May not meet the stringent health and character tests undertaken by holders of a visa with work entitlements. **Source: DIAC Fact Sheet 87 - Initiatives to Combat Illegal Work in Australia.**
 - ii The Department undertakes a broad range of activities to address illegal work. Employer awareness training sessions are conducted to educate employers, industry peak bodies and unions about immigration status checking with the aim of reducing the number of illegal workers. We are continuing with the national employer awareness and fraud awareness campaign targeting the horticulture industry, amongst others, in cooperation with several Commonwealth agencies.

DIAC also work together with the Australian Taxation Office, Centrelink, Australian Federal Police and State Police authorities to locate and identify illegal workers. **Source: Fact Sheet 87 - Initiatives to Combat Illegal Work in Australia**