



**CFMEU SUBMISSION RE IMPLEMENTATION OF HOWELLS REVIEW OF EMPLOYER SANCTIONS  
LEGISLATION 2011**

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## Executive summary

The CFMEU welcomes the Government's 'in principle' commitment to implement the recommendations of the Howells review. With some modifications, these recommendations should be implemented without delay.

The CFMEU supports the proposed new three-tiered employer sanctions regime comprising with strict liability civil penalties and fines (the infringement notice system), as well as criminal penalties – essentially the recommendations of the original review over a decade ago, in 1999.

### Criminal provisions

Simply maintaining the current criminal offences and penalties will not address the serious deficiencies that Howells identifies in these provisions - even with the recommended 'deeming employment' provision and the strengthened powers to gather documentary evidence.

More effective criminal measures are needed to ensure a proper and effective scale of sanctions within the legislation to deter the full range of unlawful behaviour associated with the engagement for work of unlawful non-citizens and other non-citizens working without permission.

The current requirement that a person '*knows or is reckless as to whether*' another person is entitled to work should be removed and should either expressly provide that the offences are ones of strict liability; OR should introduce statutory defences, proof of which would lie on the defendant, along the lines of those proposed for the civil penalty provisions.

Another option is to replace the current requirement with constructive knowledge i.e. '*knows or ought reasonably to have known*' that the illegal worker is not entitled to work.

### Strict liability civil offence and penalty

The offence should be: allows or refers one non-citizen to work when the person does not have any current permission to work, not 'two or more' non-citizens.

The 'broader definition of employment and employer' (Para 206(4)) should apply across all three tiers and should capture, as well as intermediaries:

- a) persons doing work as either employees or subcontractors ('any work' as in current legislation); and
- b) the principal contractor in the construction industry responsible for a site where non-citizens (without permission to work) are engaged by subcontractors. The CFMEU supports a legislative provision specifically identifying the principal contractor in the construction industry as having obligations and liability for the engagement of such workers by subcontractors.

There should be a continuing employer obligation to check ongoing entitlement to work (as in the UK legislation), not just at the commencement of work (Para 206(7)).

The 'offence' should be defined as 'allowing' or 'referring' to work each individual worker, so that if 10 such workers ( with no current permission to work) are involved, that will constitute 10 such offences rather than one offence involving 10 workers.

The maximum penalty of \$10,000 should apply to each offence, as defined above, ie for each worker.

Allowing the non-citizen to work in breach of a visa condition as to number of hours or prescribed time (eg, overseas students, Working Holiday visa holders), where those hours/times are exceeded with that employer – this should be clearly defined as a strict liability civil offence, and be subject to the same penalty regime as applies for other offences under this provision.

Infringement notices system (Para 209) – the amount of fine should reflect the seriousness of the conduct involved in employing persons without permission to work.

Unions should be granted standing to bring civil penalty proceedings, as in the *Fair Work Act*.

### **Effective implementation**

This requires:

- Substantial additional resources of at least \$2.4 million per year for DIAC for investigation and prosecution, as proposed in Howells's letter of transmittal, without reducing existing budget allocations for DIAC compliance monitoring and enforcement.
- Delegating to the Fair Work Ombudsman Inspectors the power to investigate and prosecute non-compliance with the new legislation regarding employer sanctions.
- Extending the current data matching and sharing arrangements which DIAC has with the ATO in regard to visa-overstayers, to visa subclasses with a high propensity to work in breach of visa conditions, such as overseas students. This will reduce the cost of locating employers of persons working without entitlement.
- Naming and shaming of employers transgressing, on DIAC's website, as a low-cost deterrent.

### **Research**

As well as further research on overseas students working in breach of the hours specified in their visa conditions (Para 212), DIAC should commission independent research to provide more reliable estimates of the size and characteristics of the illegal worker population, the number and characteristics of employers of such workers, and publish updated estimates each year.

- There could be 10,000 such employers of non-citizens with no permission to work, in 2011.

### **Complementary measures**

Immigration-related penalties should be imposed alongside the civil penalties, eg denial of 457 sponsorship; Government procurement policy and the Construction industry code of practice should be used to encourage compliance with the new Employer Sanctions Act.

## **1. Introduction**

The Construction, Forestry, Mining and Energy Union of Australia, (CFMEU) welcomes the opportunity to make this submission on the implementation of recommendations in the Howells review of the *Migration Amendment (Employer Sanctions) Act 2007* (the Act).

The CFMEU consists of three Divisions namely the Mining and Energy Division, Forestry and Furnishing Products Division and the Construction and General Division. We are the major union in these industries and represent approximately 110,000 members.

The Department of Immigration and Citizenship's (DIAC) own data shows that the industry sectors covered by the CFMEU are very high risk areas for the employment of unlawful non-citizens (visa overstayers) and lawful non-citizens working in breach of their visa work conditions.

According to this data on the number of such workers DIAC located by industry (cited in the Howells report at p55, table 5), Agriculture, Forestry and Fishing was ranked first, Construction second, Manufacturing (which includes Furnishing products manufacturing) third. Mining was ranked sixteenth.

## **2. Background – Government acceptance of the review's recommendations**

The Immigration Minister Mr Chris Bowen announced on 21 July 2001 that 'the government has agreed in-principle to the review's recommendations, which include:

- Introducing a new three-tiered employer sanctions regime with civil penalties and fines, as well as maintaining the current criminal penalties;
- Putting in place protections for employers that do the right thing by checking work entitlements;
- Better education and awareness for employers and labour hire groups on their obligations; and
- Greater powers for compliance officers to gather documentary evidence against non-compliant employers.'<sup>1</sup>

Mr Bowen also said that 'as part of the penalty overhaul, the government would consult with stakeholders on the Howells Review's recommendations and ways to better enforce the existing law, while safeguarding the majority of employers that do the right thing'.

Subsequently the Department wrote to the CFMEU inviting submissions on these matters 'and any other matters that you consider need to be addressed in implementing the recommendations of the Review.'

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<sup>1</sup> Chris Bowen MP, Minister for Immigration and Citizenship, 'Major crackdown on employing illegal workers', media release 21 July 2011.

### 3. Overall CFMEU position

The CFMEU welcomes the Government's 'in principle' commitment to implement the recommendations of the Howells review. We believe that with some modifications detailed below, these recommendations should be implemented without delay.

The key modification that we propose to the Howells recommendations is directed to strengthening the existing criminal provisions. The 3-tier regime recommended by Howells (and the earlier 1999 review) assumes effective criminal provisions on top of strict liability civil offences and penalties, and below that an infringement notice and fine system for lesser offences.

Without effective criminal provisions, the 3-tier regime is effectively reduced to a 2-tier system with the civil offence and penalties left to act as the highest level deterrent to employers of non-citizens with no permission to work. We believe this will be the undesirable outcome if the Howells recommendations are implemented without change. Our proposed changes are set out in 4.2 below.

In addition, the following considerations support rapid implementation of the new laws.

First, the problem of illegal work is getting worse, not better. DIAC's own figures show that the number of visa overstayers in Australia is growing, that that this growth is mainly overseas students. According to DIAC:

- The estimated total number of people who have overstayed their visas and are in Australia at was about 53, 900 as at 30 June 2010. This is an increase of some 5,200 or 11% over the 30 June 2009 estimate of 48,700.
- In the 2009–10, it was estimated that around 15,800 people overstayed their visa.<sup>2</sup>

The DIAC Annual Report 2009-10 also said that overstay numbers over the next few years are likely to remain high, reflecting the flow-on from the historical high NOM and Migration Program changes limiting access to permanent residence (PR) visas for overseas students.

The CFMEU's own experience in construction particularly also confirms that the problem is getting worse. In 2011, we have seen in all States/Territories more employers engaging foreign workers with either no work rights at all or working in breach of their visa work conditions; and increased numbers of such workers. Many are on student visas of various kinds.

These support Howells's conclusion that the existing legislation has been completely ineffective as a deterrent, and nothing more than a joke to serial offenders.

Second, implementing the strict liability civil penalty regime will do no more than bring Australia into line with most other developed countries such as the US, UK, Canada, New Zealand. Generally these countries have had such measures in place for many years, as the Howells report shows.

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<sup>2</sup> DIAC *Annual Report 2009-10*, Program 4.1 Visa compliance and status resolution; and *DIAC Fact Sheet 86, Overstayers and Other Unlawful Non-citizens*.

## 4. Issues

The following sets out our views on the Howells recommendations and related matters of implementation.

### 4.1 Timing of new legislation and enforcement

New legislation to give effect to Howells's recommendations (and modifications detailed below) should be drafted and introduced to the Parliament as soon as possible in 2012.

Such legislation should come into effect immediately upon passage. There should be delay in the new legislation coming into force, as there was with the *Worker Protection Act 2008* which established new employer (sponsor) obligations and visa-holder protections in the 457 visa program. This Act did not come into force until September 2009, 9 months after passage of the legislation.<sup>3</sup>

There is no justification for such a long delay in the case of new Employer Sanctions legislation. The proposal for the strict liability civil offence and penalty regime has been in the public arena for over 11 years, since the recommendations of the 1999 Review of Illegal Work (RIWA).

There is no need for any period of 'education' of employers as to their responsibilities. DIAC has for over a decade conducted extensive education programs with industry regarding the need for employers to check the right to work of prospective employees and subcontractors. DIAC's own data on the growing use of VEVO (Visa Entitlement Verification Online) by employers in all industries shows there is widespread employer knowledge and acceptance of this system.<sup>4</sup>

### 4.2 The criminal offence and provisions

The Howells Report has thrown into stark relief the problems associated with the existing provisions in the Migration Act 1958 dealing with criminal sanctions.

In his letter to the Minister enclosing the final report Mr Howells said:

I have concluded that the provisions of the Act and in particular sections 245AA to AK of the Migration Act 1958 have not proved to be an effective deterrent against the small number of employers and labour suppliers who persist in employing or referring non-citizens who do not have permission to work in Australia.

Mr Howells described the available criminal sanctions as 'very limited' and noted that they had thus far failed to secure any convictions against contest.<sup>5</sup> He referred to the structure of the existing

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<sup>3</sup> The *Migration Legislation Amendment (Worker Protection) Act 2008* received Royal Assent on 18 December 2008 but did not commence until 14 September 2009.

<sup>4</sup> The number of work entitlement checks on VEVO has risen from 16,000 in 2005-06 to 485,000 in 2009-10 (Howells, p43).

<sup>5</sup> Since the Report's release, the first successful contested prosecution has been reported, for illegally supplying foreign workers. See DIAC media release, 'Perth man guilty of illegally supplying foreign workers', 25 August 2011 [http://www.newsroom.immi.gov.au/media\\_releases/963](http://www.newsroom.immi.gov.au/media_releases/963)

offence provisions as ‘unduly complicated’ and pointed out that the evidential burden placed on prosecutors seeking to make use of the provisions was such that only 4 out of more than 100 possible cases, were considered suitable for the referral to the DDP.

The Howells report also identified the fact that the ‘principal reason’ for the failure of the current provisions is the fact that the best evidence of breach would almost always come from the workers involved but that ‘their evidence is affected by their complicity or independent culpability under section 235 of the Migration Act 1958.’ As the Report also points out, such person are likely to be removed from the country as is required under the Migration Act and in any event, the cost of detaining them until a trial is concluded would be prohibitive.

It is also noteworthy that unlike the sections dealing with those persons found to be engaging illegal workers, section 235 imposes a form of strict criminal liability on the workers themselves who are involved in illegal work.

Notwithstanding the powerful criticisms made of these provisions in the Report, the measures put forward to address these shortcomings are limited. Paragraph 211 of the Report says the criminal offences should remain ‘subject to a deeming employment provision’. Aside from this recommendation, and the proposed strengthening of powers to gather documentary evidence (Para 210), the Report appears to simply rely on the supplemental effect of the introduction of the proposed civil penalty stream as the means by which the levels of overall compliance are to be improved.

The real problem with the existing criminal sanctions is the requirement of proof of actual knowledge of the person engaging a second person on work, of the fact that the second person is an unlawful non-citizen, or a lawful non-citizen working in breach of their visa conditions. This requirement means that the criminal provisions would only operate in the most limited of circumstances where a prosecuting authority had firm evidence going to the ‘employer’s’ state of knowledge of the worker’s status as an unlawful non-citizen (or a lawful non-citizen’s visa work conditions), a point which is amply demonstrated by the prosecution statistics cited in the Howells Report (referred to above).

Left in its current form, and even including the recommended ‘deeming employment’ provision, the criminal sanctions stream is unlikely to have any real operation, meaning that potentially the most serious infringements and the ones justifying criminal opprobrium, may have to be dealt with in the civil stream or not at all.

## **Options**

The following further options for reform of the sanctions regime should therefore be considered:

1. Remove the ‘*knows or is reckless as to whether*’ requirement and expressly provide that the offences are ones of strict liability. In this case sections 6.1 and 9.2 of the Criminal Code would mean that the defence of mistake of fact would still be open to a defendant.

2. Remove the *'knows or is reckless as to whether'* requirement and introduce statutory defences, proof of which would lie on the defendant, along the lines of those proposed in respect of the proposed civil penalty provisions.

3. Remove the *'reckless as to whether'* requirement and replace it with constructive knowledge i.e. *'knows or ought reasonably to have known'* that the illegal worker is not entitled to work. This would enable a prosecutor to assess and bring evidence in relation to the objective circumstances surrounding the alleged infringement without having to discharge an evidentiary burden as to the putative transgressor's actual state of mind.

Such measures are needed to ensure that there is a proper and effective scale of sanctions within the legislation to deter and dissuade the full range of unlawful behaviour associated with the engagement for work of unlawful non-citizens.

#### **4.3 Issues common to 3-tier regime**

##### **Broader definition of employment and employer' (Para 206(4))**

The 'broader definition of employment and employer' should apply across all three tiers and should capture, as well as intermediaries:

- a) persons doing work as either employees or subcontractors ('any work' as in current legislation); and
- b) the principal contractor in the construction industry responsible for a site where non-citizens (without permission to work) are engaged by subcontractors. The CFMEU supports a legislative provision specifically identifying the principal contractor in the construction industry as having obligations and liability for the engagement of such workers by subcontractors.

##### **Principal contractor in construction**

Including the principal contractor is consistent with other workplace legislation imposing a statutory responsibility on principal contractors, notably for occupational health and safety, for example in the *Queensland Workplace Health and Safety Act 1995* and similar Acts in other jurisdictions.

#### **4.4 Strict liability civil offence and penalties**

First, the offence should be: allows or refers one non-citizen to work when the person does not have any current permission to work, not 'two or more' non-citizens {Ref Para 206(2)}.

The Howells report gives no justification for exempting the employer of one non-citizen with no current permission to work from the application the civil offence (and presumably relegating this conduct to the realm of the infringement notice system only, with max fine of \$1,000).

The CFMEU submits that the government should reject this approach, for the following reasons.

- There is no such requirement in the criminal provisions, which clearly state that the offence can involve employment of a single person. For consistency, civil regime should be the same.

- This sends entirely the wrong message about the seriousness of the offence of employing non-citizens with no permission to work - to employers, the courts, and the community. The message is that employing ONE person (with no permission to work) is not a serious issue. Courts will surely take this into account in determining the amount of penalties for employers of two or more such workers, and hand out fines considerably below the \$10,000 maximum.
- This in turn will undermine the deterrent effect of the civil penalty regime.

Second, there should be a continuing employer obligation to check ongoing entitlement to work (as in the UK legislation), not just at the commencement of work (Para 206(7)).

Third, the 'offence' should be defined as 'allowing' or 'referring' to work each individual worker, so that if 10 such workers (with no current permission to work) are involved, that will constitute 10 such offences rather than one offence involving 10 workers.

Fourth, the maximum penalty of \$10,000 should apply to each offence, as defined above, ie for each worker.

Fifth, allowing the non-citizen to work in breach of a visa condition as to *number of hours or prescribed time* (eg, overseas students, Working Holiday visa holders), where those hours/times are exceeded with that employer (Para 208) – this should be clearly defined as a strict liability civil offence, and be subject to the same penalty regime as applies for other offences under this provision.

- Para 208 currently is not clear that this particular offence qualifies as an equivalent civil offence (and carries the same penalty of \$10,000 max) as employing other non-citizens with no permission to work. It should be made clear that it does.
- Para 208 currently captures only 'allowed' to work, not 'is referred' to work, but both should be captured, eg., a labour hire coy referring overseas students to host employers should be presumed to know the total hours that the visa-holder has worked in a week.
- Employers of Working Holiday visa-holders (WHVs) are not strictly captured by 208, because their visa work condition is not hours-related, but time-related (6 months max with one employer). But employers of WHVs should be captured, and this should be made clear.

Finally, unions should be granted standing to bring civil penalty proceedings, as in the *Fair Work Act*.

#### **4.5 Infringement notice system**

Infringement notices system (Para 209) – the amount of fine should reflect the seriousness of the conduct involved in employing persons without permission to work.

The Infringement notice regime must be backed by clear and firm Ministerial directives to DIAC officers that policy should be implemented firmly, with deterrence the primary objective not the 'educative' approach to employers as taken in 457 enforcement where the so-called 'educative' role takes precedence in DIAC's approach.

#### **4.6 DIAC Investigatory powers**

The CFMEU supports these additional powers..

#### **4.7 Additional Resources, FWO, and ATO data matching**

First, substantial additional resources of at least \$2.4 million per year for DIAC for investigation and prosecution should be provided, as proposed in the Howells report, without reducing existing budget allocations for DIAC compliance monitoring and enforcement.

Second, the new legislation or other arrangements (eg MOUs) should delegate to Fair Work Ombudsman Inspectors the power to investigate and prosecute non-compliance with the new legislation regarding employer sanctions.

- There is precedent for designating the FWO as the body to investigate compliance with a non-FWA piece of legislation, namely the *Paid Parental Leave Act 2010*, Part 4-2
- In any event, it makes sense for a much larger pool of expert FWO workplace inspectors to be charged with responsibilities under Employer Sanctions laws, to add to the ‘eyes and ears’ on the lookout for the unlawful employment of non-citizens. (DIAC currently has only 27 Inspectors Australia-wide, under the *Worker Protection Act*.)

Third, the data matching and sharing arrangements which DIAC currently has with the ATO in regard to visa-over-stayers, should be extended to visa subclasses with a high propensity to work in breach of visa conditions, such as overseas students.

Under these arrangements, DIAC provides the ATO with the names of visa overstayers and the ATO is able to identify those overstayers who filed a tax return, their employer and residential address – and provide this information to DIAC for actioning.

More extensive data matching will reduce the cost of locating employers of persons working without permission to work, at least those who file tax returns. This is a low-cost way of improved targeting.

#### **4.8 Naming and shaming of employers transgressing**

‘Naming and shaming’ employers and labour suppliers found to have employed or referred illegal workers would assist in changing behaviour and creating more effective deterrence. This is a low-cost but high-impact and effective deterrent and should be adopted.

- This strategy should be legislated for, to prevent the strategy being constrained or overturned on ‘privacy’ grounds.
- DIAC should be legally obliged to ‘name and shame’ on its website offending employers/labour suppliers after a threshold level has been reached, eg more than one Illegal Worker Warning Notice (IWWN) or Infringement Notice. There should be no DIAC discretion in this matter.

#### **4.9 Research**

As well as further research on overseas students working in breach of the hours specified in their visa conditions (Para 212), DIAC should commission independent research to provide more reliable estimates of the size and characteristics of the illegal worker population, and – more importantly - the number and characteristics of employers of such workers, and publish updated estimates each year.

Both the Howells report and the Immigration Minister’s statement refer to the ‘very small number’ of employers believed to be employing non-citizens without permission to work, even though the Report estimates up to 100,000 such workers.

But there would be around 10,000 employers of such non-citizens, assuming an average of 10 such workers per employer. This is not a trivial number, and shows the level of effective deterrence needed to reduce the scale of this activity.

#### **4.10 Complementary measures**

##### **Sponsorship eligibility (DIAC-related)**

DIAC should require all employers seeking approval as sponsors for employer-sponsored visas (eg the subclass 457 visa) to commit to the use of VEVO as a condition of being approved; and to demonstrate that they are using VEVO during the period that they have approved sponsorship status.

##### **Government procurement**

Employers and others employing/referring illegal workers should be ineligible to tender for Australian government contract work for a prescribed period which could vary according to the seriousness of the offence or breach. This should apply in construction and all other sectors.

All organisations tendering for government contract work should have an obligation to use VEVO. This also should apply in construction and all other sectors.

The Commonwealth government should negotiate with the States/Territories to secure similar provisions in their government procurement arrangements.

##### **Construction industry code of practice**

22. The obligation to comply with Australian immigration laws including especially the ESL should be written into the construction industry code, the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (August 2009).

The relevant section is 6.1, Legal obligations relating to employment, under “Workplace relations and Occupational Health Safety and Rehabilitation components”. A suitable addition to the Code would read as follows:

**Engagement of Non-Citizens/Non-Residents.**

Compliance with the Migration Act 1958 (as amended from time to time) is essential to protect the integrity of the Australian labour market. Parties must ensure that persons engaged in the performance of construction work are lawfully entitled to be so engaged. The unlawful engagement of non-citizens/non-residents is inconsistent with the Code and Guidelines. Court decisions, penalties and/or penalty notices under the Migration Act will be assessed under Clause 4.2.3 herein.

#### **4.11 Sham contracting**

The Immigration Minister's media release on the Howells report refers to sham contracting.

The CFMEU's March 2011 report *Race to the Bottom* set out the scale and implications of 'sham contracting', ie where an employer tries to disguise an employment relationship as an independent contracting relationship.

As the CFMEU said in its July 2010 submission to the Howells review, more serious penalties should apply where the employer/entity is found to have been engaging or allowing non-citizens with no permission to work in sham contracting arrangements. This constitutes further exploiting such workers and should be treated as an aggravated offence.

With DIAC data indicating some 16% of all non-citizens (without permission to work) working in construction, that means around **16,000** such workers in construction – and most of these would be placed in sham contracting situations by their employers, based on the CFMEU's experience.

This again underlines the urgent need for effective legislation, and action to implement investigations and prosecutions under those laws.