New liability of executive officers for employment of illegal workers

By Emma Mackey, Legal Director, Mackey Lawyers

- Amendments to the Migration Act create new offences relating to the employment of foreign nationals not entitled to work in Australia
- Executive officers (including directors, company secretaries, chief executives and chief financial officers) are potentially personally liable for companies employing illegal workers
- Vital to assess your existing workforce and its status regarding permission to work in Australia, and ensure that all human resources managers are aware of the amendment, and take appropriate steps

Civil and criminal liability for executive officers of companies that employ or refer non-Australian workers without a visa — or with a visa but without appropriate permission to work — is incorporated into legislation passed recently by Parliament.[1]

The new provisions will be proclaimed shortly and come into operation. This development puts human resources policies and procedures in relation to employing non-Australian workers and management of agents and contractors relationships on company secretaries' risk-management priority list in 2013.

New legislation

The *Migration Amendment (Reform of Employer Sanctions) Act 2013* (the Act), which amends the *Migration Act 1958*, (Migration Act) enacts new provisions including civil and criminal liability provisions for company directors, chief executive officers, chief financial officers and company secretaries of companies that employ 'illegal workers'.

Who is an illegal worker?

For the purposes of this article we have used the term 'illegal worker' to mean both a non-Australian worker without a valid visa and a non-Australian worker who has a valid visa but works in contravention of the work-permission condition of the visa.

Who would employ an illegal worker?

No valid visa

Many employers inadvertently employ illegal workers. While most non-Australian workers have a valid visa on commencement of their employment, their status can change without notice to the employer.

If proper checks are not part of the employer's staff engagement procedure, the non-Australian worker may never have had a valid visa, even at the commencement of the employment.

If the worker continues to work after their visa has ceased, they become an illegal worker. A common example is the many non-Australian workers who are sponsored by an Australian spouse for permanent residency. The worker is often working while the visa application is being processed. Visa processing can take up to a year. If the visa application were refused, the Department of Immigration and Citizenship (DIAC) would *not* notify the employer of the decision, as the employer is not a party to the application. If workers stays,

despite being given notice to leave Australia, they will no longer have a valid visa and become an illegal workers.

Alternatively, the relationship with the Australian partner can break down and the sponsoring partner may withdraw support for the worker's permanent residency visa application. If this occurs before the permanent visa is issued, and the worker does not leave Australia when given notice to do so, they will no longer have a valid visa.

To ensure that a worker continues to hold a valid visa, employers must undertake regular checks of visa status throughout the period of employment until the worker obtains a permanent residency visa.

Working in contravention of work-permissions condition

Similarly, there are many ways that a non-Australian worker who has a valid visa can work in contravention of the work-permission condition of the visa. One example is an overseas student who holds a student visa. Most student visas have a condition[2] that prohibits the holder from working more than 40 hours a fortnight during term time. A student visa holder who works in excess of 40 hours in any fortnight is an illegal worker.

Another example of working in contravention of the work-permission condition of a visa often occurs with holders of working holiday visas[3] These visas permit the holder to work for one employer for up to six months only.[4] A working holiday visa holder who works beyond the six-month period with one employer works in contravention of the work-permission condition of the visa.

What is the scope of the problem?

Although there have been penalties for companies employing illegal workers for some time, these provisions were found not to have been effective. Is the Act using a sledgehammer to crack a nut by introducing liability for executive officers of companies? Apparently not, as the former Minister for Immigration and Citizenship, Chris Bowen, noted that the problem of illegal workers remains, with recent estimates putting the number of illegal workers in Australia 'at around 100,000'.[5]

The Act introduces a graduated set of sanctions for parties either allowing an illegal worker to work or for referring an illegal worker to a third party to work. The Act creates civil penalty provisions and an infringement notice process as an alternative to court proceedings.

History of legislative attempts to reduce illegal workers

Tackling illegal workers has had bipartisan support over many years. Based on the 1999 Review of Illegal Workers commissioned by former Liberal Minister Philip Ruddock, the Howard Government introduced legislation that came into effect on 19 August 2007.[6] At the time of its introduction, a two-year review of its effectiveness commenced.

The former Labor Minister for Immigration and Citizenship, Senator Chris Evans, appointed barrister Stephen Howells QC to undertake the Howells Review on 21 May 2010 with a brief to report on the operation of the 2007 legislation and the issue of illegal workers. Mr Howells reported to Senator Evans's successor, Chris Bowen, on 2 March 2011.[7]

On 21 July 2011, Minister Bowen announced that the government would introduce legislation addressing the key Howells Review recommendations.

History of the Act

The Migration Amendment (Reform of Employer Sanctions) Bill 2012 was introduced into the House of Representatives on 19 September 2012. It was passed by both Houses of Parliament and received royal assent earlier this year. It is expected that the proclamation date will be 1 June 2013.

Purpose of Act

The purpose of the Act is:

> to deal with the problem of noncitizens working without permission in Australia, through the creation of effect laws to sanction persons who allow to work, or refer to a third person for work, those unlawful noncitizens and lawful noncitizens who do not have that permission.[8]

In particular, the Act introduces a graduated set of sanctions for parties either allowing an illegal worker to work or for referring an illegal worker to a third party to work. The Act creates civil penalty provisions and an infringement notice process as an alternative to court proceedings. It also creates civil penalty orders and prosecution for criminal offences that it is envisaged will be used to deal with persistent non-compliance or serious breaches of the Act.[9]

In line with the recommendations of the Howells Review, it also introduces statutory defences available where reasonable steps were taken by employers or referrers to check that a non-Australian worker had a visa with appropriate permission to work.

New offences and contraventions

After proclamation, the new offences and contraventions will be found in Pt 2 of the Migration Act. These offences include:

- allowing an unlawful non-citizen to work[10]
- allowing a lawful non-citizen to work in breach of a work-related condition[11]
- aggravated offences if a person allows, or continues to allow, another person to work[12]
- referring an unlawful non-citizen for work[13]
- referring a lawful non-citizen for work in breach of a work-related condition[14]
- aggravated offences if a person refers another person to a third person for work[15]
- criminal liability of executive officers of bodies corporate[16]
- civil liability of executive officers of bodies corporate.[17]

Defence

Other than the two aggravated offences, each of the first six offences or contraventions above includes a provision which provides that the offence or contravention is not committed if the person took 'reasonable steps at reasonable times' to verify that the worker is not an unlawful non-citizen or is not in breach of a work-related condition solely because of the work being undertaken for the employer.[18]

These reasonable steps are defined to include using a computer system prescribed by Regulations and doing one or more things prescribed by the Regulations. As the new provisions are yet to be proclaimed, there are no supporting regulations at this point. However it is clear that the computer system alluded to is DIAC's Visa Entitlement Verification Online (VEVO) system[19] for which employers register to access visa information online.

The aggravated offences relate to workers being exploited. Given that exploitation is defined to include forced labour, sexual servitude or slavery[20] it is not likely that there will be many cases that fall under these provisions.

Liability for executive officers of bodies corporate

An executive officer is defined to mean a director, the chief executive officer (CEO), the chief financial officer (CFO) and the secretary.[21] Executive officers will have liability under the new provisions where the:

- company by which the officer is engaged commits one of the offences or contraventions listed above
- officer knew that, or was reckless or negligent as to whether, the work-related offence or contravention would be committed
- officer was in a position to influence the conduct of the company in relation to the work-related offence and
- officer failed to take all reasonable steps to prevent the work-related offence being committed.[22]

Reasonable steps

In determining whether an officer took all reasonable steps to prevent an offence or contravention being committed, a court is required to consider what action the officer took to:

- ensure that employees, agents and contractors had a reasonable knowledge and understanding of their obligations under the Act and
- when they became aware that the body was committing the offence or contravention.

Penalties — executive officers personally liable

The criminal penalty for an executive officer found to have committed a criminal offence is a fine of up to 20 per cent of the maximum fine that a court could impose on the employer, based on the circumstances.

The civil penalty for an executive officer found liable under the civil liability provisions is up to $15,300 per contravention.[23]

Immigration governance action plan for 2013

As a high priority, company secretaries should investigate whether:

- the company's human resources policies and procedures at the point of engagement ensure a thorough check of whether all candidates have permission to work
- the company is registered to undertake VEVO visa checks and relevant staff are trained to use the VEVO system
- a VEVO visa check is undertaken in relation to all non-Australian workers before they are engaged and, if this has not previously been done, in relation to all existing employees who hold temporary visas
- there are regular VEVO and other appropriate checks in place to ensure that workers holding Australian temporary visas at the commencement of employment continue to hold a visa with appropriate work rights throughout the employment
- rostering practices ensure that student visa holders do not work more than 40 hours in any fortnight
- an alert system is in place to ensure that workers with conditions limiting the time that they can work for one employer cannot work beyond the permitted period
- adequate steps are being taken to ensure that directors and employees (which includes the CEO, CFO and human resources employees), agents and contractors have a thorough understanding of the new provisions. If not, adequate steps need to be taken to address the deficiencies through amended policies and procedures, the implementation of contractual obligations with agents and contractors (such as recruiters and labour hire providers) and an education program aimed at all three groups and
- the governance policies and procedures are adequate in light of the new provisions.

Once the new provisions are proclaimed, company secretaries should ensure that:

- human resource directors include details of compliance with the new provisions in reports to the board of directors, the CEO and the CFO — who all have potential liability under the new provisions
- the new regulations inserted into the *Migration Regulations 1984* to support the new provisions are examined and consequential amendments are made to policies and procedures; and
- further changes to policies and procedures are communicated to directors, employees, agents and contractors at that point.

Once the new provisions are proclaimed and the supporting regulations are implemented other investigations and changes may become necessary. It would be prudent to take professional advice at this point.

As a general note, a regular audit of policies, procedures, documentation and training undertaken by a Registered Migration Agent who is also a legal practitioner is useful to identify and remedy governance issues relating to immigration law, particularly if the company is an approved sponsor under the 457 Visa Program.

Emma Mackey can be contacted on (03) 8319 0991 or by email at elm@mackeylawyers.com.au.

Notes

1 This article does not consider the application of the legislation to other legal entities such as partnerships or unincorporated associations nor the liability of third parties who refer workers
2 Condition 8105
3 Working Holiday Visa (Subclass 417); Work & Holiday Visa (Subclass 462)
4 Condition 8547
5 Minister's Second Reading Speech in relation to the Migration Amendment (Reform of Employer Sanctions) Bill 2012, 19 September 2012
6 *Migration Amendment (Employer Sanctions) Act 2007*
7 Howells S, 2011, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007*
8 Minister's Second Reading Speech, op cit
9 ibid
10 s 245AB
11 s 245AC
12 s 245AD
13 s 245AE
14 s 245AEA
15 s 245AEB
16 s 245AJ
17 s 245AK
18 ss 245AB(2), 245AC(2), 245AE(2) and 245AEA(2)
19 Minister's Second Reading Speech, op cit
20 s 245AH
21 ss 245AJ(5) and 245AK(5)
22 ss 245AJ(1) and 245AK(1)
23 At the date of publication, one penalty unit is defined to be $170: s 4AA Crimes Act 1914 ■