Submission to the Department of Immigration & Citizenship

Exposure draft of the Migration Amendment (Reform of Employer Sanctions) Bill 2012

By the Australian Mines & Metals Association (AMMA)

August 2012

About AMMA

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 94 years, AMMA's vast membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as allied suppliers to those industries.

Executive Summary

AMMA believes it is important that penalties are in place to deter businesses and individuals from hiring illegal workers from overseas. However, AMMA believes the existing framework is sufficient provided there is greater awareness of the current penalties and sanctions against employers who do the wrong thing. While it is important that penalties are in place to deter businesses and individuals in respect of work by non-citizens, the significant number of strong measures in the exposure draft of the *Migration Amendment (Reform of Employer Sanctions) Bill 2012* would impose disproportionate cost and inconvenience on resource industry employers, even though work by non-citizens has not been identified as a significant occurrence within the resource industry.

Overall, it is imperative that the cost of doing business is balanced appropriately against the cost of ensuring compliance with migration laws. The Howells Review found that the existing employer sanctions framework had not been an effective educational tool for employers. A rectification of this through a reinvigorated awareness campaign targeted at high-risk industries, coupled with the existing criminal sanctions, will deter non-compliant behaviour and maximise voluntary compliance, while avoiding unnecessary costs to business.

AMMA recommends:

1. That a targeted awareness strategy be engaged in as a first priority, and civil provisions with strict liability be deferred until effective educational campaigns have occurred, particularly in high-risk sectors. This will ensure that greater compliance burdens are not placed unnecessarily on all employers in all sectors as a result of the actions of a few.

2. That the responsibility for compliance be with the direct employer, not the host. The current arrangements should continue, where labour hire agencies and subcontractors, as the direct employers, rather than the host employers or head contractors, take responsibility for the employment status of the workers they refer. This will ensure that employers are responsible for the actions that are within their control.

3. That proposals to: extend liability for offences to executive officers; introduce new information gathering powers including search warrants; and remove protections against self-incrimination should not form part of the final Bill as they represent a departure from standard practice in such areas.

4. That the availability of Enterprise Migration Agreements be supported and facilitated. This will reduce illegal work by enabling non-citizens to work lawfully, ensuring full checks and balances on their employment eligibility status before commencing work in Australia.

These recommendations will be discussed further below.

The proposed reforms and AMMA's recommendations

Shift to a three-tiered system of sanctions

Under the proposed legislative changes, the existing criminal sanctions will be supplemented with non-fault based civil penalties and an infringement notice scheme, resulting in a three-tiered framework of employer sanctions for involvement in illegal work practices.

Non-fault based civil penalties

Civil penalties are proposed to be introduced and will apply to businesses and individuals who allow or refer to work an unlawful citizen or a non-citizen without the required work permission. The key difference to the existing criminal sanctions is that there will no longer be any requirement to prove an employer was *reckless* or *knew* that a non-citizen did not have permission to work. Strict liability means it will be enough that a non-citizen is found to be working in violation of their entitlements.

In order to protect compliant businesses, statutory defences will be available where employers take reasonable steps to verify the work permission of a non-citizen. Such steps may include viewing evidence of permanent residence, viewing a visa label or conducting a work rights checks via the Visa Entitlement Verification Online (VEVO) system.

Infringement notice scheme

Under the proposals, an infringement notice scheme will be created as an alternative to commencing court proceedings for civil penalties. DIAC will issue infringement notices but businesses receiving notices can avoid court action in the first instance by paying specified amounts.

Education and awareness should be key priority

AMMA supports a system of penalties and sanctions applying to employers who knowingly and repeatedly employ illegal workers. However, as the Howells Review identified, the great majority of employers do not deliberately employ or engage non-citizens who lack the permission to work.

Given that DIAC has identified that illegal workers are concentrated in particular sectors, a targeted education and awareness campaign should be the first step in those sectors.

Data provided by DIAC indicates that of the 1,669 illegal workers found in Australia in 2009-10, over half were in the 'agriculture, forestry & fishing' and 'accommodation, cafes and restaurants' industries. It is imperative that the Government acts cautiously in this area to ensure that greater compliance burdens are not placed unnecessarily on all employers in all sectors as a result of the actions of a few.

The Howells Review found the existing employer sanctions framework did not provide adequate awareness to employers about their obligations. It is therefore proposed that the reforms be supported with a campaign aimed at employers and industry groups to raise awareness of the new offences and how to comply with the changes, including where it would be prudent to check work entitlements.

Favourable alternatives to further infringement notices and civil penalties include:

- greater investment in the Visa Entitlement Verification Online (VEVO) system to ease the compliance burden and assist employers to fulfil their obligations;
- initial warning notices to employers rather than penalties or sanctions; and
- reinvigorated and ongoing targeted employer education activities.

These strategies represent favourable alternatives to infringement notices and civil penalties. Not only do they avoid unwarranted compliance burdens on business but, as the Howells Review Regulation Impact Statement[1] acknowledges, would have the added benefit of:

- finding more cost-efficient ways to conduct entitlement checks, resulting in more voluntary compliance and fewer incentives to persist with non-compliance;

[1] Reform of Employer Sanctions (Howells Review): Regulation Impact Statement 2011

- creating greater awareness of existing penalties and acting as a deterrent to non-compliance, also leading to increased voluntary compliance by business; and
- making labour hire agencies, sub-contractors and other direct employers more familiar with the verification tools available, resulting in a greater uptake of VEVO users and work entitlement checks.

Overall, as an alternative to increased compliance measures in the form of infringement notices and civil provision penalties, the above strategies would provide a balance between the cost of doing business and the cost of ensuring compliance with migration laws.

Recommendation: That a targeted awareness strategy be engaged in as a first priority and that civil provisions with strict liability be deferred until effective educational campaigns have occurred, particularly in high-risk sectors.

Cost to resource industry employers

The current regime provides principal contractors with a level of indemnity when a sub-contractor engages an illegal worker, provided the contract between the principal contractor and sub-contractor explicitly shifts labour hire responsibilities to the sub-contractor. The same currently holds true for businesses using labour hire intermediaries.

The proposals will have the effect of broadening the criminal offences and civil provisions so that a person/employer who, according to DIAC, 'participates in the chain of events that result in a foreign national being allowed to work illegally can be held liable for breaching the employer sanctions provisions'[2].

Table 1: The existing employer sanctions

	Criminal offences
Maximum penalties	2 years imprisonment and/or fines of: $13,200 (Individual) $62,000 (Business)
Scope	Labour hire intermediaries and subcontractors, rather than primary employers, bear responsibility for workers they refer. Employers are liable for the employees they directly hire.
Proof burden	Knowledge or recklessness proven beyond reasonable doubt.

[2] [2] Policy Commentary: Migration Amendment (Reform of Employer Sanctions) Bill 2012

Table 2: The proposed 'three-tiered' employer sanctions

	Infringements	**Civil Penalties**	**Criminal offences**
Maximum penalties	$1,980 (Individual) $ 9,900 (Business)	$9,900 (Individual) $49,500 (Business)	2 years imprisonment and/or fines of: $13,200 (Individual) $62,000 (Business)
Scope	Any person that participates in the 'chain of events' that results in a foreign national being allowed or referred to work without the required permission.		
Proof burden	None: A financial infringement that acts as an alternative to commence court proceedings.	Strict civil liability: no requirement to prove recklessness or knowledge. Sufficient to prove that, on balance of probabilities, a breach has occurred.	Knowledge or recklessness proven beyond reasonable doubt.

A key concern of AMMA on behalf of its members is ensuring that employers are not unduly burdened by having to directly check the work rights of every prospective employee, especially those of their many subcontractors and those hired through external labour hire agencies. This type of red tape will be a major issue for employers depending on how high up the food chain the liability for illegal workers extends. AMMA maintains that head contractors should not be held liable for the actions of subcontractors who may hire illegal workers. As long as employers have asked for assurance from their subcontractors that their workers have the right to work in Australia, that should be enough to discharge any liability for offences.

The current framework provides principal contractors with a level of indemnity if their sub-contractors engage illegal workers, provided the contract between the principal contractor and sub-contractors explicitly places labour hire responsibilities, including determining employees' eligibility to work, with the sub-contractor or direct employer. The same currently holds true for businesses using labour hire firms or agencies. AMMA maintains that these arrangements should continue going forward.

AMMA maintains that employers should only bear responsibility for activities within their exercise of control. It is imperative that employers be afforded the full integrity of contracts including the right to outsource employment arrangements to labour hire companies and to accept the assurances of sub-contractors about the legal status of workers. This is especially important given the large size and complex nature of many resource and construction projects in which contracting arrangements play an

important role in sourcing and verifying the status of labour. AMMA maintains these current arrangements must be preserved.

Recommendation: That labour hire agencies and subcontractors, as the direct employers, rather than the host employers or head contractors, continue to take responsibility for the employment status of the workers they refer.

There are a number of concerns about the legislation in addition to the changes in criminal and civil responsibility. The extended liability of executive officers, evidence gathering powers (new notices to produce and search and entry powers), search warrants and the removal of protections against self-incrimination all represent a significant step too far against employers. DIAC's policy commentary paper itself acknowledges that stripping away protections against self-incrimination is a departure from standard practice.

The proposed scheme is highly sophisticated and the reach of its measures is of significant concern. Similar schemes such as the national heavy transport laws that employ the 'chain of responsibility' principle generally stop short of imposing strict liability. In their current form, the proposed reforms will provide an unwarranted intrusion into the business affairs of resource industry employers.

Recommendation: Proposals to: extend liability for offences to executive officers; introduce new information gathering powers including search warrants; and remove protections against self-incrimination should not form part of the final Bill as they represent a departure from standard practice in such areas.

Relevant benefits of EMAs

It is important to remember that the proposed reforms to the employer sanctions legislation are just one part of a broader policy framework that is already in place to reduce the incidence of illegal work in Australia[3]. Another key measure is the ability for non-citizens to work lawfully under a range of visas that have work entitlements attached. These include 457 business visas and working holiday visa subclasses.

[3] Department of Immigration and Citizenship, Discussion Paper: Review of Employer Sanctions Legislation – Combating Illegal Work in Australia.

One recent development in this area has been the announcement of Enterprise Migration Agreements (EMAs), which act as an umbrella migration arrangement for a designated, typically large-scale project. The Federal Government's National Resources Sector Employment Taskforce (NRSET) described EMAs as a 'new temporary migration initiative to help address the skill needs of the resource sector'.[4]

AMMA continues to be a vocal supporter of EMAs. Interim research by Dr Susanne Bahn from Edith Cowan University, which was partially funded by AMMA, has found that temporary migrant workers play an essential role in filling highly skilled vacancies that cannot be met domestically in the short term. For that reason, in order to broaden the reach of the benefits of EMAs, AMMA recommends that the EMA eligibility requirements for projects be lowered from $2 billion to $1 billion of capital expenditure and from a peak workforce of 1,500 to 500 workers. This would enable at least another 27 projects to gain eligibility and potentially up to 43 (based on publicly available data from the Bureau of Resources and Energy Economics) in addition to the existing range of 22 to 44 projects that would currently be eligible.

Not only are EMAs essential for Australia's future prosperity, but they represent a way to reduce illegal work by enabling non-citizens to work lawfully, ensuring full checks and balances on their employment eligibility status. EMAs typically use registered migration agents to ensure satisfactory compliance with the required guidelines and, as such, are less likely to breach migration laws. EMAs are tailored through applications and negotiations with DIAC to suit a specific business or project - delivering a standard set of conditions under which international workers may be hired. EMAs therefore have a role to play in reducing the number of foreign nationals working in Australia without the required permission, and in providing certainty to employers.

Recommendation: That DIAC make an ongoing commitment to facilitate Enterprise Migration Agreements (EMAs) through widening the net of eligible projects and processing and approving eligible EMAs in a timely fashion.

[4] *Fact Sheet 48a – Enterprise Migration Agreements*, Department of Immigration & Citizenship http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm

Background to proposed legislation

On 12 December 2011, the Federal Government announced it would legislate to reform the existing employer sanctions regime which comprised criminal offences for persons or businesses that illegally hired or referred non-citizens for work.

The existing framework

The existing employer sanctions framework encompasses the following criminal offences:

- allowing or referring an unlawful non-citizen to work; and
- allowing or referring a non-citizen to work in breach of a visa condition.

In order to be prosecuted for one of these offences, an element of either knowledge or recklessness about the offence must be proven beyond reasonable doubt. These criminal offences attract maximum penalties of two years' jail and/or fines of up to $13,200 for individuals, and fines of up to $66,000 for companies. For more serious cases involving the exploitation of workers, including forced labour, an aggravated offence may be charged. These offences involve penalties of up to five years' imprisonment and/or $33,000 in fines for individuals and $165,000 for companies.

Reform mandate

The Howells Review found that the existing employer sanctions framework had not been an effective deterrent against the small number of employers and labour suppliers who illegally allowed or referred non-citizens for work.

The Department of Immigration and Citizenship ('DIAC') articulated the importance of addressing the issue of illegal work in the following terms:

> *Unfettered, illegal work hire practices undermine the integrity of Australia's migration program and can result in the exploitation of vulnerable workers. Such conduct may also put businesses that only engage workers who are entitled to work at a competitive disadvantage and reduce work opportunities for Australian citizens and foreigners with permission to work*[5].

[5] Policy Commentary: Migration Amendment (Reform of Employer Sanctions) Bill 2012

The Howells Review identified three particular pitfalls in the existing sanctions frameworks:

Lack of an effective deterrent	That the existing criminal offences had been difficult to prosecute due to the evidential burden of proving either 'knowledge or recklessness' to a criminal standard.
Lack of scope	That the scope of the sanctions is insufficient to cover non-standard relationships such as informal labour hire and intermediaries.
Lack of education & awareness	That the existing legislation does not operate as an effective educational tool for employers and labour suppliers.

The proposed changes in brief

To address these key deficiencies directly, the Howells Review made three key recommendations:

Supplementary deterrents	That the existing criminal sanctions be supplemented with civil liability provisions and an infringement notices scheme, resulting in a three-tiered sanctions framework.
Broadened scope	That the scope of the sanctions be broadened such that a person or company involved in the 'chain of events' that result in a foreign national being allowed or referred to work without the required permission can be found liable.
Increased awareness	That the sanctions be supported with better education and awareness for employers and labour hire groups on their obligations.

The Federal Government accepted the changes the Howells Review recommended and these now form the basis of the exposure draft of the *Migration Amendment (Reform of Employer Sanctions) Bill 2012,* which is the subject of this review.

The stated policy intent[6] of the reforms is to introduce a graduated series of sanctions, from education and information, infringements and civil penalties to criminal prosecution in order to:

- deter illegal work hire practices;
- sanction employers and labour hire suppliers that persist in non-compliant behaviour, and
- maximise voluntary compliance.

AMMA is happy to provide further details on any aspect of this submission. Please contact AMMA's Workplace Policy Officer Luke Achterstraat on (02) 9211 3566 or at luke.achterstraat@amma.org.au or Executive Director – Industry, Minna Knight on (07) 3210 0313 or at minna.knight@amma.org.au for further information.

[6] Policy Commentary: Migration Amendment (Reform of Employer Sanctions) Bill 2012